152 US 157

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1385~~. ~~248~~ ~~471~~ 238

THE EL PASO WATER COMPANY, APPELLANT,

vs.

THE CITY OF EL PASO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 13, 1890.

1 THE STATE OF TEXAS, }
County of El Paso. }

At a term of the circuit court of the United States for the western district of Texas, begun and holden at the city of El Paso, El Paso county, State of Texas, on the first Monday, being the 7th day, of April, A. D. 1890, and which adjourned on the 25th day of April, A. D. 1890, the Hon. T. S. Maxey, judge of said district, presiding, the following cause came on for trial, to wit:

THE EL PASO WATER COMPANY }
vs. } No. 11.
THE CITY OF EL PASO. }

On the 29th day of October, A. D. 1889, the complainant, the said "The El Paso Water Company," filed in said cause its original bill for injunction, which is in words following, to wit:

In the Circuit Court of the United States for the Western District of Texas, at El Paso Sitting. In Equity.

EL PASO WATER COMPANY }
vs.
THE CITY OF EL PASO. }

To the judges of the circuit court of the United States for the western district of Texas:

The El Paso Water Company, a private corporation created and organized under and by virtue of the laws of the State of Kansas, brings this its bill against the city of El Paso, a municipal corporation created and organized under and by virtue of an act of the Legislature of the State of Texas entitled An act to incorporate the city of El Paso, approved the 17th day of May, A. D. 1873, which said municipal corporation is situated in the county of El Paso, in the western district of Texas, and whose chief officer is Richard Caples, mayor of said city, and whose councilmen are R. F. Johnson, Dan. Kelley, Henry A. True, J. P. Hague, Waller Merrick, A. Solomon, M. B. Davis, and Louis Papin; and thereupon your orator complains and says that, under and by virtue of the said act of the Legislature of Texas and the general laws of said State, the city
2 council of said city acquired the power to provide said city and the inhabitants thereof with water, and for that purpose to contract with any water corporation for the supplying with water its streets, alleys, lots, squares, and public places; that under and by virtue of an ordinance passed by the city council of said city on the 7th day of May, A. D. 1881, the said council granted to the El Paso Water Company, a private corporation then existing in said city, the sole and exclusive right, warrant, and authority for the period of fifteen years to manufacture, sell, and furnish water to the

inhabitants of the city of El Paso, to both public and private buildings and for irrigation, within the corporate limits of said city, and the sole and exclusive right, warrant, and authority for said period to lay pipes, "mains, and conductors underneath the streets, alleys, lanes, and squares in said city for the purpose of conducting water;" that thereafter, to wit, on the 29th day of April, A. D. 1882, the said last-mentioned company bargained, transferred, and assigned all of the rights, powers, privileges, and franchises conferred upon it, as well by its charter as by the aforesaid ordinance, to Sylvester Watts, who in turn bargained, transferred, and assigned the same to your orator; and that by an ordinance passed on the 29th day of April, A. D. 1882, entitled "An ordinance supplemental to an ordinance entitled an ordinance granting certain privileges to the El Paso Water Company," passed May 7th, 1881, the aforesaid city council in all respects ratified and confirmed said bargain, transfer, and assignment made by said company to said Watts and all the acts and proceedings of said company in connection therewith or in relation thereto, and that by said last-mentioned supplemental ordinance the said city council did contract and agree to rent and did in fact rent from the said company and its successors or assigns, for and during the period of fifteen years from the 1st day of September, A. D. 1882, twenty-five fire-hydrants, to be located along the line of mains of said company, and did further agree to pay an annual rental of one hundred dollars for each of said hydrants for
3 said period, and in addition to pay to said company, its successors or assigns, for each hydrant constructed or located in excess of said twenty-five hydrants the sum of eighty dollars per annum.

Your orator further shows that, having incorporated and organized under the laws of the State of Kansas after the aforesaid sale and transfer to said Watts, and having after incorporating and organizing received from said Watts an assignment of all the rights, privileges, powers, and franchises acquired by him under the aforesaid sale to him by said company and the said ordinances of said city council, it proceeded at once to lay pipes and mains in said city and under the streets, alleys, lanes and public squares thereof; to construct large and expensive reservoirs and pumping stations within the limits of said city; to place engine and pumps therein, and generally to establish, locate, and operate within the limits of said city an elaborate and costly plant, including every appliance and fixture made necessary to carry out its contract with said city to supply water to said city and its inhabitants; that in thus carrying out its said contract it had expended a large sum of money, to wit, the sum of one hundred and fifty thousand dollars, and now owns in said city property, as above described, of the reasonable value of said sum of money, and that since about the 1st day of September, A. D. 1882, it has by means of its plant aforesaid continuously supplied and is still supplying said city and its inhabitants with water for all domestic and other purposes.

Your orator further shows that not only did it originally acquire from said city by contract as aforesaid the said sole and exclusive

right, warrant, and authority, but such contract has in divers ways and by divers acts been subsequently acquiesced in, acted on, and ratified by the council and other authorities of said city until the 24th day of August, A. D. 1889, on which last-named date, by an ordinance then passed, the city council of said city, composed of the councilmen and mayor aforesaid, authorized and ordered the issuance (subject to a vote of the majority of the ad valorem
4 tax-payers of said city) of twenty-five thousand dollars in El Paso city coupon bonds of the denomination of one thousand dollars each, to be known and styled on their face as El Paso city water-works bonds, and by such ordinance declared that the proceeds of the sale of said bonds should be used for the purpose of sinking artesian wells and providing water works for said city, and that said ordinance further provides that when said bonds are prepared, signed, and registered the mayor and finance committee of the city council shall be empowered to negotiate and sell the same at not less than their par value.

Your orator further shows that said last-mentioned ordinance authorizes the levy of a special tax on real and personal property within said city sufficient to pay the interest on said bonds and to create a sinking fund for the redemption of the same; that at an election held in said city for the purpose of determining whether or not said bonds should be issued a majority of the ad valorem taxpayers of said city voted in favor of their issuance; that thereafter, after ascertaining and declaring the result of said election, the mayor of said city advertised for bids for said bonds, and on the — day of October, A. D. 1889, the city council of said city accepted the bid and agreed and determined to sell said bonds to them, and that by public ordinances and acts as hereinbefore set forth, as well as by many open, public, and notorious acts and declarations of the authorities of said city, it is made manifest that the said city council, in disregard and violation of the aforesaid contract with your orator and of the said ordinances granting to it its aforeaid exclusive privileges, has wrongfully and unlawfully determined to and will (unless restrained) establish and operate water works within the limits of said city and undertake for and in behalf of said city to furnish water to said city and its inhabitants for all public and private purposes.

Your orator further shows that if the declared purpose of said city council is carried out as above set forth it will render valueless both the property aforesaid of your orator, as well as its rights, privileges, and franchises as conferred by the said contract and
5 ordinances, and your orator will sustain thereby great and irreparable injury.

Wherefore your orator prays that process issue to said mayor and councilmen, and upon final hearing that they and said city be enjoined and perpetually restrained from establishing, maintaining, or operating any water works within the limits of said city until said period of fifteen years shall expire, and from selling and nego-

tiating any bonds or other securities for that purpose. You orator prays for all general relief.

NUGENT & STANTON,
Att'ys for Pl'ff.

Thereafter, to wit, on the 22nd day of March, A. D. 1890, the said complainant filed in said cause its amended bill, which is in words following, to wit:

"EXHIBIT D."

List of Voters Not on City Assessor and Collector's Rolls of ad Valorem Tax-Payers Voted at Artesian-Bond Election, September 27, 1888.

No. of ballot.	First ward.
1	Frenchy Nelson.
6	J. A. Brock.
7	J. C. Bauch.
19	Frank Ashton.
29	A. H. Parker.
41	J. J. Conners.
44	A. A. Bentley.
49	John Evans.
50	Francisco Terrases.
52	George Sawer.
53	C. F. Slack.
55	Fred. Lurkins.

6

No. of ballot.	First ward.
59	B. Vegarren.
60	George High.
65	L. H. Toenneges.
	"Second ward."
8	W. W. Phillips.
10	I. B. Furgeson.
13	Juan Marquez.
17	E. D. Luxton.
22	T. C. Lyons.
27	B. B. Shay.
32	Tomas Bandt.
44	Geo. W. Baylor.
46	Felix Chavis.
51	W. C. Denny.
61	A. J. Wells.
70	D. F. Farrell.
72	Bill Crocket.
73	T. B. White.
93	Chas. Ball.
95	W. C. Bradley.
96	W. B. Wimberly.

98.....J. J. H. Stine.
101.....G. M. Garther.
102.....W. H. Watts.
103.....W. J. Jones.
108.....J. M. Kinney.
109.....H. Gray.

Third ward.

7.....D. R. Williams.
14.....T. A. Gibbs.
24.....H. W. Brandt.
29.....W. E. Race.
39.....T. L. Ennis.
45.....A. Musenberger (Levis, in Mexico).
60.....F. W. Berks.
66.....Geo. E. King (rendered in wife's name).
69.....P. A. Keller " " "
74.....A. P. Coles.
79.....G. H. Eubanks.
87.....B. P. Eubanks.
91.....Frank Carr.
95.....J. Blanchette.
98.....H. Nelson.
100.....R. F. Jones.
83.....Fred. Shafer.
104.....E. L. Shackelford.
105.....J. T. Bell.
111.....T. T. Teel.
112.....Breton Davis.
113.....Oscar Larden.
118.....W. Newman.
123.....C. N. Buckler.
124.....J. R. Montfort.
125.....L. Freudenthal.
126.....John Hosterter.
128.....Frank Sutton.

7 EXHIBIT "C."

"Extract."

On motion of Alderman Kitchen, and in compliance with section 12 of the city charter, the city council, sitting as a board of canvassers, proceeded to open the returns and canvass and declare the result of a special election held in the city of El Paso on the 27th day of September, 1889, at which the ad valorem tax-payers of the city voted on the question of ratifying the action of the city council in authorizing the issuance of twenty-five thousand dollars ($25,000) in bonds for the purpose of sinking artesian wells and providing water works for the city of El Paso.

The election returns, which were found to be in proper form, were *which were* then opened by the mayor, canvassed by the city council, and the result declared as follows:

First ward.		For the issuance of bonds to sink artesian wells, etc.	54	
"	"	Against the issuance of bonds to sink artesian wells, etc.		4
2nd	"	For the issuance of bonds to sink artesian wells, etc.	104	
"	"	Against the issuance of bonds to sink artesian wells, etc.		5
3rd	"	For the issuance of bonds to sink artesian wells, etc.	123	
"	"	Against the issuance of bonds to sink artesian wells, etc.		6
4th	"	For the issuance of bonds to sink artesian wells, etc.	52	
"	"	Against the issuance of bonds to sink artesian wells, etc.		4
		Total vote	343	19

The records of the city assessor and collector's office show that the total number of resident ad valorem tax-payers of the city who were entitled to vote at said election were 435, three hundred and forty-three (343) of whom have voted in favor of the issuance of said bonds.

The city council therefore declare that the ad valorem tax-payers of the city have, by a majority of their votes, ratified the action of the city council, as required by section 89 of the city charter.

On motion of Alderman Kelly, the water-works bond ordinance was declared carried by a majority of one hundred and six (106) votes, more than the necessary number.

I, George E. Bovee, city clerk of the city of El Paso, do hereby certify that the foregoing is a true and correct copy from the minutes of the city council, dated October 1st, 1889, as recorded in Book "F," Council Proceedings, page 51.

Given under my hand and the seal of the city of El Paso on the fourteenth day of March, A. D. one thousand eight hundred and ninety.

[SEAL.] (Signed) G. E. BOVEE,
City Clerk.

Election Ordinance to Vote on Water-Works Bonds.

Be it ordained by the city council of the city of El Paso:

SECTION 1. That the mayor shall, by proclamation published in the daily newspapers in this city, call for an election on Wednesday, September 25th, 1889, for the purpose of ratifying the action of the city council in passing the water-works bond ordinance passed and

approved August 24th, 18—, and determining whether or not there shall be isssued water-works bonds to the amount of twenty-five thousand dollars ($25,000), and such proclamation shall state the places at which said election is to be held, one in each ward, and the presiding officer in each ward, except as herein otherwise provided. The election shall be held, votes counted, and returns made in the same manner as is now or may hereafter be provided for the election at which members of the Legislature are elected.

8 I, George E. Bovee, city clerk of the city of El Paso, do hereby certify the foregoing to be a true and correct copy of section 1 of an ordinance adopted by city council and approved by the mayor on the 24th day of August, A. D. 1889, as recorded on page 14*a* and 14*b* of Book 'F,' City Council Proceedings.

Given under my hand and the seal of the city of El Paso on this the fourteenth day of March, anno Domini one thousand eight hundred and ninety.

[SEAL.] G. E. BOVEE, *City Clerk.*

Sec. 1 of this ordinance was amended Aug. 27, 1889, by changing time of holding election from Sept. 24 to Sept. 27th, 1890.

See page 15, Book 'F,' Council Proceedings.

No. LLX.

An Ordinance Authorizing Issue of Water-Works Bonds.

Be it ordained by the city council of the city of El Paso:

SECTION I. That there shall be, and is hereby, ordered issued twenty-five thousand dollars in El Paso city coupon bonds of the denomination of one thousand dollars ($1,000), each of which shall be known and styled on their face as "El Paso city water-works bonds," and that the proceeds from the sale of said bonds shall be used for the purpose of sinking artesian wells and providing water works for said city.

When said bonds are prepared, signed, and registered, as provided by sections 90, 91, and 92 of the city charter, the mayor of the city and the finance committee of the city council are hereby empowered to negotiate and sell the said bonds for the best interest of the city, at not less than their par value.

SECTION II. Said bonds shall bear date of October 1, 1889, and interest from date thereof at the rate of six per cent. (6 per ct.) per annum, payable semi-annually on the 1st days of April and October of each year, and shall mature in twenty years from date. Said interest shall be payable in the city of New York at the Chemical National Bank. Said bonds shall be numbered from one to twenty-five, and each bond shall have forty coupons attached, each coupon to represent one semi-annual installment of interest. The city of El Paso hereby reserves the right to redeem at par the said bonds or any of them at any time after ten years from the date thereof by giving notice thereof by advertisement for thirty days in newspapers published in New York city and El Paso. Said bonds shall be redeemed in the order in which they are numbered—

that is to say, the bond being numbered "one" shall be first
9 redeemed, and any bond so advertised for and designated as aforesaid and not being presented for redemption as aforesaid upon the day named in said notice shall cease to bear interest from and after said day.

SECTION III. Said bonds shall specify for what purpose they are issued, and the fund set aside for payment of the interest and the redemption of the same, and shall in all particulars conform to the requirements of the city charter.

SECTION IV. There shall be created a special fund to be known as the water-works fund, and for that purpose there shall be collected annually a sinking fund of one thousand two hundred and fifty dollars ($1,250), or one-twentieth part of the principal, and a sufficient amount additional to pay the necessary semi-annual payments of interest, which fund shall not be diverted or drawn upon for any other purpose; and the city treasurer shall honor no drafts on said fund except to pay interest upon or redeem the bonds for which it was provided.

SECTION V. There shall be, and hereby is, levied an annual special tax on all real and personal property in the city of El Paso sufficient to raise the amount of one thousand two hundred and fifty dollars ($1,250) for the sinking fund and to pay the annual interest on said bonds, payable semi-annually. Said tax is hereby levied for the year 1889 and every year thereafter until said bonds are paid, both principal and interest, and said tax shall be collected as other taxes: Provided, however, that whenever the income from said city water works is sufficient or nearly sufficient to pay the interest and annual sinking fund the council shall have the right to proportionately reduce or dispense with said tax, on condition that there shall not be any deficiency in the interest or sinking fund.

SECTION VI. Whenever there is as much as one thousand dollars ($1,000) in the sinking fund it shall be invested in State of Texas or United States or El Paso city or El Paso county bonds, or used in the redemption of the bonds aforesaid, as the city council may direct.

SECTION VII. That the city treasurer must make quarterly and separate reports as to the condition of this special fund, and must also report in his monthly report the amount of revenue received from the water works.

SECTION VIII. This ordinance shall be in effect after a majority of ad valorem tax-payers shall, in an election, vote in favor of issuing said bonds.

Adopted by the city council August 24th, 1889.
Book "F," page 14*a*.
Recorded, page 45.
Approved August 24th, 1889.
(Signed) RICHARD CAPLES, *Mayor*.

Attest:
(Signed) G. E. BOVEE,
City Clerk.

I, George E. Bovee, city clerk of the city of El Paso, Texas, hereby certify the foregoing to be a true and correct copy of ordinance No. 11-X as it appears in Minute Book "F" of the City Proceedings, of which it forms a part.

[SEAL.] Given under my hand and the seal of the city of El Paso, Texas, this the fourteenth day of March, anno Domini one thousand eight hundred and ninety.

G. E. BOVEE,
City Clerk.

Exhibit A.

10 Circuit Court of the United States for the Western District of Texas, April Term, in the Year A. D. 1890, at El Paso Sitting.

THE EL PASO WATER COMPANY
vs.
THE CITY OF EL PASO. } No. 11. In Equity.

The El Paso Water Company, a private corporation created and organized under and by virtue of the laws of the State of Kansas and whose principal place of business is in said State of Kansas, but which is doing business in the said city of El Paso under and by virtue of a permit issued by the secretary of *the* state of the State of Texas, brings this its amended bill against the City of El Paso, a municipal corporation, situated in the county of El Paso and the said western district of Texas.

And thereupon your orator complains and says that it filed its original bill against the defendant in this court on the 29th day of October, A. D. 1889, wherein it prayed for an injunction on final hearing to restrain the said defendant from establishing, maintaining, or operating any water works within the limits of said city and from selling or negotiating any bonds or other securities for that purpose, and for other relief, as stated in its said original bill.

And your orator further says, by way of amendment, that the said the city of El Paso was duly incorporated and organized as a body corporate and politic under and by virtue of a special act of the Legislature of the State of Texas approved the 17th day of May, A. D. 1875, by which act the said city, as a body corporate and politic, acquired the power, among others, to sue and be sued, to make all contracts, and to do all other acts in relation to the property and concerns of said city necessary to the exercise of its corporate or administrative powers; that by said act the government of said city was vested in a mayor and two city councilmen, elected from each of the wards of said city; that it was provided by said act that the said mayor and councilmen should constitute the city council of said city; that the said council should have the care, management, and control of said city and its property and finances, and should have power to enact and ordain all ordinances not repugnant to the constitution and laws of this State (Texas), and such

ordinances to alter, modify, and repeal; that it should further have power (among others) by ordinance to provide said city with water; to make, regulate, and establish public wells, pumps, cisterns, fountains, hydrants, reservoirs in the streets or elsewhere within the said city or beyond the limits thereof for the extinguishment of fires and for the convenience of the citizens, and to make, establish, and regulate all irrigating ditches and have entire control of the same; that it should further have exclusive power and control over the streets, alleys, sidewalks, lanes, avenues, and public grounds and highways of said city; and it was further provided and especially declared by said act that it, the said act, should be deemed a public act; that it might be read in evidence without proof, and that judicial notice thereof should be taken in all courts and places.

And your orator further shows that under and by virtue of a special act of said Legislature entitled "An act to grant a new charter to the city of El Paso," approved the 2nd day of March, A. D. 1889, the said body corporate and politic was continued, with perpetual succession, by the name and style of the city of El Paso, under which name it was provided by said act that the said body corporate and politic should have the right to sue and be sued and, among others, should have the power to make such contracts as might be necessary for the more perfect execution or enjoyment of the powers, duties, rights, franchises, and immunities by such act granted or imposed.

11 Your orator further shows that by last-mentioned act the municipal government of said city was vested in a city council composed of the mayor and board of aldermen elected under and by virtue of the provisions of said act, and the said act conferred upon said city council the power "to provide or cause to be provided the said city with water;" to make, regulate, and establish public wells, pumps and cisterns, hydrants, and reservoirs in the streets or elsewhere within the city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants; to prevent the unnecessary waste of water, and to make, establish, and regulate all irrigation ditches and have entire control of the same, and, further, gave to said council the "exclusive control and power over the streets, alleys, and public grounds and highways" of said city; and it was further provided and especially declared by said last-mentioned act that it, the said act, should be deemed a public act, and that the courts should take judicial knowledge thereof at all times and in all proceedings; and it was further provided by said special act, approved March 2nd, 1889, that the said city council should have the power to borrow money upon the credit of said city for the purpose of supplying said city with water and providing water works and other permanent public improvements, and issue coupon bonds of said city for such money so borrowed; but that no bond should be issued unless the same should be ordered by the said city council at a regular meeting thereof by a two-thirds majority of all the members elected, nor until the action of said council should be ratified by a majority of the ad valorem tax-

payers of said city at an election held for the purpose of determining whether or not such bonds should be issued.

Further amending, your orator shows that under and by virtue of the provisions of each of the aforesaid acts as above set forth, as well as under and by virtue of the general laws of the State of Texas, the city council of the said city of El Paso acquired the power to supply said city and the inhabitants thereof with water for all public and private purposes, and for that purpose to contract for such water supply with any individual or water corporation; that, acting under and by virtue of the provisions of said first above mentioned special act as above set forth, as well as under the general laws of said State, the said city council of the said city of El Paso acquired the power to supply said city and the inhabitants thereof with water for all public and private purposes, and for that purpose to contract for such water supply with any individual or water corporation; that, acting under and by virtue of the provisions of said first above mentioned special act as above set forth, as well as under the general laws of said State, the said city council, by an ordinance duly passed and adopted on the 7th day of May, A. D. 1881, granted to the El Paso Water Company, a private corporation composed of persons at that time resident tax-payers of said city, and duly created and organized under and by virtue of the laws of the State of Texas, and whose principal place of business was then in said city, the exclusive and sole right, warrant, and authority to supply said city and inhabitants with water, and to lay pipes, mains, etc., in the streets, lanes, etc., of said city, as alleged and set forth on the first and second pages of your orator's said original bill, and by said ordinance, in consideration of said privileges, required said company to furnish water to the public buildings in said city at actual cost, which requirement was not only proposed but fully accepted by said company.

And your orator, further amending, shows that said El Paso Water Company was so created and organized by its said corporators for the purpose and with the intent alone of contracting with said city council for the supplying of said city and its inhabitants with water, and of thereafter inducing non-resident capitalists to undertake the erection of water works in said city and the supplying of said city and its inhabitants with water by transferring and assigning to such capitalists the contract so made by them with said council; all of

12 which was fully known to and understood and concurred in by said council at the time said exclusive privileges were granted as aforesaid; and here your orator would further show that at the time of the creation and organization of said corporation, as well as at the time of the passage of said ordinance of May 7th, A. D. 1881, and at the time of the transfer by said company to Sylvester Watts and by said Watts to your orator, as hereinafter and by said original bill set forth, the said city was a small and comparatively unimportant municipal corporation, limited in resources and population and just beginning a new growth under the stimulus afforded by the recent construction of several lines of railway to her limits; that the said city, as well as the citizens

thereof, were at said dates destitute of the requisite means to establish water works or other facilities necessary to supply said city and the inhabitants thereof with water, and the said persons so organizing and composing said company, with full knowledge of such facts and for the purposes and with the intent aforesaid, went before the said city council and obtained from them the passage of the said ordinance of May 7th, 1881, granting the exclusive privileges aforesaid, at the same time proposing to furnish the public buildings in said city with water at cost, which benefit was secured to said city by said ordinance; that at the time of the passage of said ordinance, as well as the time of the transfer and assignment by the El Paso Water Company to Sylvester Watts and at the time of the transfer and assignment by said Watts to your orator, as specified in said original bill, it was well understood and known by both said parties composing said company and said city council, and is here charged as a fact, that because of the want of means, both of said city and its citizens, a system of water works necessary to furnish said supply of water could only be established and built up by outside or non-resident capitalists, and that such capitalists could only be induced to invest their means in such enterprise by granting to them for a series of years such exclusive privileges and rights as are granted by said ordinance; and your orator here charges that such ordinance was passed and said exclusive privileges granted and held out by said council for the sole and avowed purpose of inducing such non-resident capitalists to engage and invest their means in said enterprise.

And here your orator would further show that at the time of the adoption of said ordinance, as well as at the time of the assignment by the said company to Sylvester Watts and at the time of the assignment of said Watts to your orator as aforesaid, it was well known to said corporators and said council and the citizens of said city generally, and is here charged as a fact, that on account of the small size of said city, the paucity of her population, and her limited means capitalists investing money in such enterprise could not hope for a number of years to realize any income whatever from such investment, but that in consequence of the future growth in the population and resources of said city, of which many things then gave promise, capitalists so investing, if granted an exclusive right as aforesaid, might reasonably hope within a few years to begin to derive an income from such investment, and before the expiration of the period limited for the duration of their exclusive privileges might not only make up for the loss of income in the first few years of such period, but make in the aggregate a fair profit on their invested capital; and here your orator shows that for the first three years since the establishment of its said system of water works it derived no available income from its investment, but that all income derived from the operation of such system, which was in fact small and unimportant, was during said three years reinvested in said city in necessarily adding to said system so as to enable your orator to carry out its contract with said city.

And your orator, further amending, shows that at the time of the

passage of said ordinance the Rio Grande river, which runs by and constitutes in part the western boundary of said city, was and still is the only source from which a supply of water adequate for said city and its inhabitants could be drawn; that to obtain such
13 supply from said river and properly distribute it throughout said city it was and still is necessary to elevate water from the bed or channel of said river to a height of two hundred feet, and at such elevation to collect it in reservoirs for the purpose of ridding it of silt by settling and distributing it to said city and its inhabitants aforesaid; that by reason of such facts the cost of furnishing said city and its inhabitants with water was and has continued to be unusually great, requiring the use of expensive machinery and an enormous outlay for fuel and other necessary purposes; that at said time said city was and has continued to be remote from market where machinery and material and the necessary fixtures and appliances could alone be obtained, which were and are indispensable in establishing, maintaining, and carrying on a system of water works, and that in addition to all of these facts the cost of labor and other necessary incidental expenses conn cted with the operation of said system in said city were and have continued to be unusually, even extraordinarily, great.

And your orator, further amending, shows that because of all the facts hereinbefore recited and set forth, which were well known to and fully discussed and understood by the said corporators and the citizens and authorities of said city, the said city council of said city could not at the passage of said ordinance nor at any time since until quite recently, as hereinafter shown, have provided said city and inhabitants with water by means of any system of water works or other facilities and appliances adequate to that end, nor was it practicable or possible for said council to obtain such water supply and thus carry out and exercise the power conferred on it by said first-mentioned special act in any other manner than by contract with non-resident capitalists, granting and guaranteeing to said capitalists special exclusive rights and privileges for a series of years, as was done by said ordinance of May 7th, 1881, and other ordinances supplemental thereto and amendatory thereof, as set forth in said original bill.

And your orator would here further show that it is a private corporation, composed entirely of non-residents of the State of Texas, and that all of its original investment in its said water works in said city was made entirely with capital drawn from beyond the limits of said State; that it was knowingly induced by said city council to engage in the enterprise of establishing such works and furnishing said city and inhabitants with water, as in said original bill and hereinafter set forth, by the grant of said exclusive rights and privileges, and that it would not (as was well known to said council) have engaged in such enterprise and invested its capital therein but in consideration of such exclusive rights and privileges so granted as aforesaid and the consequent exemption from competition after by the growth in wealth and population of said city its investment should begin to yield a fair return or income.

Your orator, further amending, shows that after obtaining the passage of said ordinance of May 7th, 1881 (which said company applied for and obtained subject to the conditions and upon the considerations therein stated), it, the said El Paso Water Company, on the 29th day of April, A. D. 1882, transferred and assigned all of its rights, powers, privileges, and franchises arising under its charter and said ordinance to Sylvester Watts, as is fully set forth in said original bill, and thereafter, to wit, on the 16th day of August, A. D. 1882, the said Watts bargained, transferred, and assigned all the rights, privileges, powers, and franchises acquired by him from said company to your orator, the said Watts and your orator successively receiving such assignments with the knowledge, acquiescence, and concurrence of said council and subject to the conditions and upon the considerations expressed in said ordinance.

Your orator, further amending, shows that after succeeding to the aforesaid rights, powers, privileges, and franchises it at once proceeded to and did in fact establish a complete system of water works within the corporate limits of said city, adequate in every respect for the supplying of said city and its inhabitants with water for all purposes, both public and private, at a cost of more
14 than seventy thousand dollars ($70,000), and since establishing such works your orator has from time to time enlarged, extended, and added to the same at great cost and expense in order to maintain in said system a capacity for storing and distributing water commensurate with the growth of said city in size, population, and wealth, expending in so doing the further sum of about eighty thousand dollars ($80,000), so that at this time the said system is amply sufficient for the furnishing of said city and its inhabitants with water, and by means of the same, as established, enlarged, extended, and added to as aforesaid, your orator, since about the first day of September, A. D. 1882, has been and still is faithfully carrying out its contract with said city in supplying said city and its inhabitants with water for all public and private purposes, and has fully prepared to and will (if permitted so to do) continue to provide such supply of water for the whole of said period of fifteen years, which period your orator avers was reasonable, proper, and necessary under all the circumstances in granting and limiting its aforesaid exclusive rights and privileges.

And your orator, further amending, shows that by an ordinance duly passed and adopted by said city council on the 24th day of December, A. D. 1883, entitled an ordinance amending sections one, two, three, four, five, and adding section six to an ordinance supplemental to an ordinance entitled "An ordinance granting certain privileges to the El Paso Water Company, passed May the 7th, 1881," which said supplemental ordinance was passed April 29th, 1882, it was provided and enacted as follows, to wit:

First. That the city of El Paso agreed to and did rent "from the El Paso Water Company, meaning the company first hereinbefore mentioned, and its successors and assigns, for and during the term of fifteen years from the first day of September, A. D. 1882, twenty-five hydrants (25), to be located by said company as directed by the

city council of said city, and to be erected at the expense of said company or its successors or assigns.

Second. That said council agreed to pay an annual rental for each of said twenty-five hydrants of one hundred dollars, and for each hydrant constructed or erected as directed by said council in excess of said twenty-five hydrants and to and including fifty hydrants, the sum of sixty dollars per annum, and for each hydrant erected and located as directed by said city council in addition to and over and above said fifty hydrants, the sum of forty dollars per annum, the rental for all of said hydrants to be paid in quarterly installments.

Third. That said company or its successors or assigns, from and after the first day of January, A. D. 1884, should not charge any of the inhabitants of said city a sum exceeding four cents per barrel of forty gallons until such times as said city should have a population of eight thousand, after which time and until such time as said city should have a population of twelve thousand a sum not exceeding three cents per barrel of forty gallons should be charged for water.

Fourth. That for sprinkling purposes water should be taken by said city or any persons engaged in sprinkling the streets, alleys, or public grounds with carts or wagons at a cost not to exceed two cents per barrel of forty gallons, and by any of the inhabitants of said city for private sprinkling at a cost not to exceed three cents per barrel of forty gallons.

Fifth. That approved meters should be furnished, attached, and placed wherever and whenever necessary on said works at the cost of said company, meaning your orator.

Sixth. That in the maintenance of said water works, meaning the system established by your orator, a pressure of at least one hundred and fifty feet should be provided and maintained.

Seventh. That said El Paso Water Company, meaning your orator, should give a written guarantee to the city of El Paso that only clear, healthy water should be delivered to any of the inhabitants of said city for private uses under a penalty of free service for such time as the water delivered should be muddy and impure, and that said water company, meaning your orator, should further file its written acceptance of said ordinance of April the 29th, 1882, as amended by said ordinance of December 24th, 1883, and that
15 said guaranty and acceptance should be spread on the minutes of said council and filed in the office of the city clerk of said city, to be and remain there as an archive.

And your orator, further amending, shows that after adopting the aforesaid ordinance of December 24th, A. D. 1883, containing the various provisions as above set forth, the said city council passed and adopted a resolution or motion, which was duly entered or recorded on the minutes of said council, by which said resolution or motion it was declared that upon acceptance of said ordinance of December 24th, 1883, by said water company (meaning your orator) and the filing by said company of their written guaranty to comply with the provisions of said ordinance the bills of said company against said city up to the first day of January, A. D. 1884, should

be paid; and thereafter, to wit, on the 28th day of December, A. D. 1883, by an ordinance on that date passed, the said city council appropriated the sum of two thousand seven hundred and sixty-six and sixty-five one-hundredth dollars ($2,766.65) to pay off and discharge all the claims and demands of your orators up to the first day of January, A. D. 1884, but by said last-mentioned ordinance further provided that no warrant should issue for the payment of said sum until your orator should file the guaranty and acceptance as required by section six of the aforesaid ordinance of December 24, 1883.

And your orator, further amending, shows that after the passage of the aforesaid ordinance, &c., your orator, by its agent, Sylvester Watts, on the 24th day of December, A. D. 1883, prepared, executed, and filed with the city clerk of said city an instrument in writing, by which it guaranteed unto said city, in consideration of the said sum of twenty-seven hundred sixty-six and sixty-five one-hundredths ($2,766.65), appropriated as aforesaid, and for other considerations, that only clear, healthy water would be delivered to any of the inhabitants of said city for private uses under a penalty for free service for such time as the water delivered should be muddy or impure, and that no charges should be made or demanded from private consumers for such water as should be muddy or impure, and by which also your orator did, without any reservation whatever, assent and agree to and accept all of the provisions of the aforesaid ordinance of December 24th, 1883; that the said ordinance of December 24th, 1883, the said motion or resolution and ordinance appropriating the sum of two thousand seven hundred and sixty-six and sixty-five one-hundredths dollars ($2,766.65) for the payment of your orator's claims up to Jan'y 1st, 1884, and requiring the filing of said acceptance and guaranty as a condition precedent to said payment, and the said instrument of writing prepared and filed by your orator's said agent were enacted and executed for the purpose of settling and adjusting controversies which had grown up between the authorities of said city and your orator, and were intended as and were in fact a recognition of your orator's rights and privileges guaranteed to it by and arising under said ordinance of May 7th, 1881, and April 29th, 1882, and the aforesaid transfer and assignment by said original El Paso Water Company to Sylvester Watts and the transfer and assignment by Sylvester Watts to your orator, as above set forth, and were intended as and did in fact evidence a contract by which, in consideration of the benefits secured to said city by said proceedings, as well as by said ordinance of May 7th, 1881, the said city undertook to and did affirm and ratify to your orator the rights and privileges granted under said last-named ordinance, as well as under its hydrant and other contracts, which were made for the purpose of affording said city facilities for extinguishing fires and to reduce the cost of water for other purposes.

time to time at points designated by said city council along the lines of mains of your orator's said system of water works, and
16 thereafter, as instructed from time to time by said council, has located and erected sixteen (16) additional fire-hydrants at its own cost and expense; that under and by virtue of its contract with said city, as evidenced by the several ordinances hereinbefore mentioned, the validity of which contract has been constantly recognized by said city and its authorities until recently, as hereinafter set forth, your orator is justly and legally entitled to receive from said city for and during the remainder of said period of fifteen years, which period began on September 1st, 1882, the sum of one hundred dollars ($100) per annum for each of said twenty-five (25) hydrants first above mentioned, and the sum of sixty dollars ($60) per annum for each of said additional sixteen (16) hydrants, making in the aggregate the sum of three thousand four hundred and sixty dollars ($3,460) which said city is bound and liable under said contract to pay to your orator for each and every year of the unexpired portion of said period; and, further, that said city under said contract is legally bound to rent from your orator for and during the unexpired portion of said period any additional hydrants over and above those already located as aforesaid which may hereafter be required in said city and to pay to your orator for each additional hydrant, which do not increase the total number of hydrants above the aggregate of fifty, the sum annually of sixty dollars (60), and for each above said aggregate the annual rental sum of forty dollars ($40); and your orator here shows that by ordinance of April 29th, 1882, supplemental to that of May 7th, 1881, the said city agreed to and did rent from your orator during said period of fifteen years, commencing September 1, 1882, twenty-five hydrants (25) for fire purposes, to be located as directed by said council, and agreed to pay your orator for each of the same an annual rental of one hundred dollars ($100), and further agreed to pay your orator annually the further sum of eighty dollars for each hydrant so constructed and erected in excess of said twenty-five hydrants; and your orator further shows that by said ordinance of December 24th, 1883, and your orator's acceptance of the provisions thereof, the city obtained an abatement of the rental price of all hydrants in excess of twenty-five (25) from eighty dollars ($80) each to sixty dollars ($60) and forty ($40) respectively, as above shown.

And your orator, further amending, shows that, differences having again arisen between said city council and your orator, your orator, to settle and adjust the same, acting by and through its agent and superintendent, W. H. Watts, on or about the 2nd or 3rd day of January, A. D. 1885, proposed to said council and agreed to furnish to said city free of charge four hundred thousand gallons (400,000) of water per annum for use in watering and irrigating the plaza of said city, commencing January 1st, 1885, and to extend to the un-

orator, all bills to be presented, when due, on the last day of the quarter, which proposition was by said city council duly accepted at or about the time of its presentation; and your orator further avers and shows that by the several ordinances, resolutions, agreements, contracts, and the various proceedings of said council as hereinbefore set forth, as well as in divers other modes and by divers other acts, the said council has, in consideration of the benefits secured to said city, thereby recognized your orator as being rightfully entitled to claim all the benefits conferred on and granted to said El Paso Water Company and its successors and assigns by the said ordinances of May 7th, 1881, April 29th, 1882, and December 24th, 1883, as well as those arising under the various contracts and agreements and proceedings hereinbefore set forth, all of which your orator avers constitute a valid and binding contract between it and said city upon sufficient consideration.

17 And your orator, further amending, shows that, after the passage of the second above mentioned special act granting a new charter to said city, the city council of said city has continued to direct the erection of fire hydrants by your orator, to make payment of rents accruing under the aforesaid hydrant contract, as well as for other water charges, and by these and many other public acts has continued to recognize your orator's aforesaid rights, as well as the binding obligation of its said contract; and your orator further shows that it has fully carried out and complied with its contract and undertaking arising under and evidenced by the various ordinances, proceedings, and agreements and acts hereinbefore set out by erecting, enlarging as circumstances required, and maintaining a complete system of water works in said city, furnishing the said city and citizens with water by erecting and maintaining fire-hydrants as required by said council, by providing all public buildings in said city with water at cost, and by furnishing four hundred thousand gallons of water for plaza purposes per annum free of charge, as well as in all other respects.

But your orator shows that, notwithstanding the aforesaid recognition of its rights by public acts, agreements, &c., all based upon adequate consideration to said city, the city council of said city, having determined to repudiate the obligations of said city to your orator as above set forth, and for the purpose of enabling itself to do so and wrongfully deprive your orator of its aforesaid rights, on the 24th day of August, A. D. 1889, passed the ordinance referred to in your orator's original bill, which was on said date duly approved, a certified copy of which ordinance is hereto attached, marked Exhibit "A," and made a part of this amended bill; that on the same day the said council adopted an ordinance, which was also duly approved on said date, by the first section of which the mayor of said city was directed by proclamation to call for an election on Wednesday, September 25th, 1889, for the purpose of ratifying the action of said council in passing said ordinance of August 24th, 1889, which ordinance was, on the 27th day of August, 1889, amended by said city council so as to require said election to be had on the 27th day of September, 1889, which first section is

hereunto annexed, marked Exhibit "B," and made a part hereof; that said election was regularly held under said last-mentioned ordinance on said 27th day of August, A. D. 1889, and the returns of the same were duly made in accordance with the requirements of the charter of said city; that on the 1st day of October, A. D. 1889, the said council, having regularly convened for that purpose at the time and place required by said charter, proceeded to canvass and open said returns and declare the result of said election; that the result of said election, as shown by the face of said returns and as declared by said council, showed that in the aggregate three hundred and forty-three (343) votes had been cast in favor of the issuance of the bonds provided for by said first-mentioned ordinance of August 24th, 1889, and nineteen (19) votes cast against the issuance of said bonds, and that thereupon the said city council declared that "the ad valorem tax-payers" of the said city had by a majority of their votes ratified the action of said council in providing for the issuance of said bonds, and that said bonds were carried by a majority of one hundred and sixty (160) votes, more than the necessary number, all of which said action of said council in canvassing the returns and declaring the result of said election will more fully appear by reference to the certified copy from the minutes of said council hereunto annexed, marked Exhibit "C," and made a part hereof.

And your orator, further amending, withdraws its allegations in its said original bill to the effect that said ordinance providing for the issuance of bonds was ratified at an election by a majority of the ad valorem tax-payers of said city, and here expressly avers and charges that such was not the case, but that, on the contrary,
18 as your orator has learned since the filing of its said original bill, the said ordinance and bond issue were at said election voted for by a considerably less than a majority of said tax-payers, and your orator here charges that the poll-lists prepared at said election by the managers thereof in the First, Second, and Third wards of said city, and by them transmitted to the mayor and city council of said city, as provided by the second amended special act aforesaid, contained the names of sixty-six (66) persons, some of whom were non-residents, and all of whom were not reported on the assessment-rolls of said city as and were in fact not ad valorem tax-payers of said city; that many who cast votes at said election in the Fourth ward of said city (the poll-list of which ward has been lost or mislaid and cannot now be found) were, as your orator is informed and believes, in like manner neither ad valorem tax-payers of said city, nor were they reported as such on the tax-rolls of said city; that the aforesaid sixty-six (66) illegal votes cast in said above-mentioned three wards and many of those cast in the Fourth ward were in favor of ratifying said bond ordinance and of issuing said bonds; that, as your orator is informed and believes, at least fifteen or twenty (15 or 20) illegal votes were cast in said Fourth ward in favor of said bond issue, and that thus between eighty and ninety (80 and 90) illegal votes were cast for said bond issue at said election in all of the four wards of the said city. A list of the names of

persons not qualified to vote and who voted in said three first above mentioned wards is shown in the paper hereunto annexed and marked Exhibit D.

Your orator further shows that at the time of said election there were at least five hundred and forty-five (545) resident tax-payers in said city qualified to vote at said election; that therefore it required two hundred and seventy-eight (278) votes of such tax-payers at least to ratify said bond issue, but that in fact at said election, if the aforesaid illegal votes be deducted, not more than two hundred and sixty-three qualified tax-payers of said city did in fact vote in favor of said bond issue.

Your orator further shows that because of the loss of the poll-lists of said Fourth ward and the fact that the ballots cast at said election are required by law to be kept sealed and your orator has not been able to have access to them a list of names of persons casting illegal votes therein cannot be here given, and the result of said election, as it would appear from a count and canvass of all the lawful votes cast thereat, can only be approximately stated.

Further amending, your orator shows that said bond ordinance was passed and said election ordered for the ratification of the same for the avowed and declared purpose on the part of said council of constructing a system of water works and sinking artesian wells, to be controlled, managed, and owned by said council, for the purpose of supplying water to said city and inhabitants for all public and private purposes, and of depriving your orator of its aforesaid exclusive privileges, as well as of the rights and benefits guaranteed to it by its aforesaid hydrant contracts, which are now yielding your orator an annual revenue of three thousand six hundred and sixty ($3,660) dollars; that said bonds have not yet been sold or negotiated, but that said city council is now endeavoring to sell or negotiate the same for the purpose of using the proceeds thereof in sinking artesian wells, and is now advertising for and receiving proposals or bids for the sinking of such wells.

Your orator further shows that its aforesaid property is regularly assessed for taxes by the authorities of said city, and that it pays to said city large annual taxes on said property, to wit, about the sum of five hundred and eighty-six dollars ($586), and that it will,
19 if said bonds are issued, be compelled to pay taxes on said property proportionally to pay the interest on said bonds and provide a sinking fund to pay the principal thereof; that your orator has no legal remedy, by contest or otherwise, against the unlawful and wrongful action of said city in declaring said bonds carried and ordering the issuance thereof.

Wherefore your orator prays as in its original bill, and, further, that said election be inquired into; that the ballots cast thereat be again counted, after rejecting all illegal votes, and that such declaration of the result thereof be decreed to be null and void; and your orator prays for all general relief.

(Signed) NUGENT & STANTON,
Sol's for Plaintiff.

And on the same day, to wit, the 27th day of March, A. D. 1890, the said complainant filed in said cause its supplemental bill, which is in words following, to wit:

List of Names of Voters at Bond Election, Feb'y 21st, 1890, Who Were not ad Valorem Tax-Payers.

P. A. Keller.
G. M. Martinez.
W. H. Weat.
W. T. V. Kitchen.
J. A. Brock.
George A. Speck.
W. G. Harrell.
Gay Porter.
G. L. Hipp.
Tim Lyons.
J. R. Blacker.
J. V. Taggart.
J. H. Comstock.
Jose M. Barella.
Everisto Albillar.
Lee Bryant.
F. Schutz.
C. C. Shelton.
W. W. Scoonmaker.
David Spencer.
Thos. G. Weston.
J. F. Stewart.
H. S. Brown.
James McDonald.
J. M. Kinney.
Mike Brannigan.
W. C. McGowan.
J. N. Bartin.
R. H. Scotten.
W. W. Rose.
F. D. Scotten.
Claude Dunning.
G. W. Baylor.
H. Kayser.
T. J. Maxey.
W. J. Jones.
C. L. Webbe.
Hidalgo Candalario.
G. H. Eubanks.
W. B. McClellan.
P. S. Jenkins.
C. B. Patterson.
J. Bennet.
Juan Marquez.
J. Blanchette.
J. H. Boone.
L. Larenz.
J. H. Peake.
D. S. Farrell.
James A. Ashford.
Thomas Ball.
L. C. Smith.
James Graves.
F. B. Simmons.
Wm. Dargitz.
G. M. Gaither.
L. M. Cole.
W. B. Wimbberly.
Lee Roberson.
M. Gonzales.
P. T. Black.
A. A. Lewis.
W. H. Shelton.
Od. Larrazola.
A. J. Stearne.
L. Blum.
W. E. Race.
J. R. Montfort.
F. R. Steele.
W. T. Bayard.

20 *Extract.*

"On motion of Alderman Solomon, the council then proceeded to open the returns and canvass and declare the result of a special election held in the city of El Paso, Texas, on the 21st day of February, A. D. 1889, at which the resident ad valorem tax-payers of the city voted on the question of ratifying the action of the city council in authorizing the issuance of the following bonds:

$75,000.00 in city bonds for the purpose of purchasing or constructing suitable water works for the city.

The election returns were then opened, found to be in proper form, canvassed by the council, and the result declared as follows:

For the issuance of seventy-five thousand dollars' water-works bonds—1st ward, 49; second ward, 119; third ward, 99; fourth ward, 49; total, 316. Against the issuance of seventy-five thousand dollars' water-works bonds—1st ward, 4; second ward, 7; third ward, 8; fourth ward, 2; total, 21."

I, George E. Bovee, city clerk of the city of El Paso, do hereby certify that the foregoing is a true and correct copy from the minutes of a special meeting of the city council held on the 22nd day of February, A. D. 1889, as recorded on page 157, Book "F," of the Council Proceedings.

Given under my hand and seal of the city of El Paso this the 14th day of March, A. D. one thousand eight hundred and ninety.

[SEAL.] G. E. BOVEE. *City Clerk.*

Exhibit C.

Alderman Papin then offered the following resolution:

"Whereas the council, having canvassed and compiled the returns of election, called upon the city assessor and collector to give the number of resident ad valorem tax-payers of the city upon his rolls, and said assessor having reported the number as 530, according to the best evidence in his possession: Therefore be it

"Resolved, That the ad valorem tax-payers of the city have, by a majority of their votes, ratified the action of the city council in authorizing the issuance of city bonds for the purpose specified."

On a call of the roll the resolution was adopted by the following vote:

Yeas—Davis, Dieter, Johnson, Kelley, Papin, Solomon, and True—7.

Absent—Alderman W. B. Merrick.

21 *An Ordinance Authorizing an Election on the Issuance of Bonds for Certain Public Purposes.*

SECTION 1. Be it ordained by the city council of the city of El Paso that the mayor of the city shall, by public proclamation published thirty days in the official paper of the city of El Paso, call for an election, at which only the ad valorem tax-payers of the city shall be entitled to vote, to be held in all four wards of the city, on the twenty-first day of February, A. D. 1890, for the purpose of voting upon the question of issuing thirty thousand dollars in city bonds for the purpose of erecting and completing public-school buildings.

Also at the same time to vote upon the question of issuing $20,000 in city bonds for the purpose of funding the floating indebtedness of the city.

Also at the same time to vote upon the question of issuing $75,000 in city bonds for the purpose of purchasing or constructing suitable water works for the city.

I, George E. Bovee, city clerk of the city of El Paso, do hereby certify the foregoing to be a correct copy of section one of an ordinance adopted by the city council and approved by the mayor on the 20th day of January, A. D. 1890, as recorded on page 131, Book "F," of the Council Proceedings.

[SEAL.] Given under my hand and the seal of the city of El Paso on this the fourteenth day of March, in the year of our Lord one thousand eight hundred and ninety.

G. E. BOVEE, *City Clerk.*

Exhibit B.

An Ordinance Concerning El Paso City Water-Works Construction Bonds.

Be it ordained by the city council of the city of El Paso:

SECTION 1. That there shall be, and is hereby, ordered issued seventy-five thousand dollars ($75,000.00) in El Paso city coupon bonds of the denomination of one thousand dollars each, which shall be known and styled on their face as El Paso city water-works construction bonds, and that the proceeds from the sale of said bonds shall be used for the purpose of purchasing or erecting and completing suitable water works for said city. When said bonds are prepared, signed, and registered, as provided by sections 90, 91, and 92 of the city charter, the city council is hereby authorized to negotiate and sell the said bonds for the best interest of the city, for not less than their par value: Provided the said bonds shall not issue until a fixed contract for the purchase of the present water works or for the erection of new works has been made and approved by the city council.

SECTION 2. Said bonds shall bear date of April 1, 1890, and interest from the date thereof at the rate of six per cent. per annum, payable semi-annually, on the first days of October and April of each year, and shall mature in thirty years from date. Said interest shall be payable in the city of New York, at the Chemical National Bank. Said bonds shall be numbered from one to seventy-five and each bond shall have sixty coupons attached, each coupon to represent one semi-annual installment of interest. The city of El
22 Paso hereby reserves the right to redeem at par the said bonds or any of them, at any time after fifteen years from the date thereof, by giving notice thereof by advertisement for thirty days in newspapers published in New York and El Paso. Said bonds shall be redeemed in the order in which they are numbered—that is to say, the bond being numbered one shall be the first redeemed, and any bond so advertised for and designated as aforesaid and not being presented for redemption as aforesaid upon the said day named in said notice shall cease to bear interest from and after said day.

SECTION 3. Said bonds shall specify for what purpose they are issued and the fund set aside for payment of the interest and the redemption of the same, and shall in all particulars conform to the requirements of the city charter.

SECTION 4. There shall be created a special fund to be known as the water-works construction fund, and for that purpose there shall be collected annually a sinking fund of at least two per cent. thereon and a sufficient amount additional to pay the necessary semi-annual payments of interest, which fund shall not be diverted or drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay the interest upon or redeem the bonds for which it was provided.

SECTION 5. There shall be and hereby is levied an annual special tax on all real and special personal property in the city of El Paso sufficient to raise the amount necessary for the sinking fund and to pay the annual interest on said bonds, payable semi-annually. Said tax is hereby levied for the year 1890 and every year thereafter until said bonds are paid, both principal and interest, and said tax shall be collected as other taxes: Provided that whenever the increase from said city water works is sufficient or nearly sufficient to pay the interest and annual sinking fund the city council shall have the right to proportionately reduce or dispense with said tax on condition that there shall not be any deficiency in the interest or sinking fund.

SECTION 6. Whenever there is as much as one thousand dollars in the sinking fund it shall be invested in State of Texas or United States or El Paso city or El Paso county bonds, or used in the redemption of the bonds aforesaid, as the city council may direct: Provided that such securities shall mature prior to the maturity of these bonds, and such investment shall be subject to the approval of the State comptroller.

SECTION 7. The city treasurer must make quarterly and separate reports as to the condition of this special fund, and must also report the amount of revenue received from the water works.

SECTION 8. This ordinance shall be in effect after a majority of the ad valorem tax-payers shall in an election vote in favor of said bonds.

Approved January 20th, 1890.

(Signed) RICHARD CAPLES, *Mayor.*

Attest:

(Signed) G. E. BOVEE, *City Clerk.*

I, George E. Bovee, hereby certify the foregoing to be a true and correct copy of ordinance No. 20, passed by the city council of the city of El Paso on the 20th day of January, A. D. 1890, and recorded in Book "F," page 130, Minutes of the City Council.

Given under my hand and the seal of the city of El Paso on this 14th day of March, A. D. 1890.

[SEAL.] G. E. BOVEE, *City Clerk.*

Exhibit A.

23 Circuit Court of the United States for the Western District of Texas, April Term, in the Year A. D. 1890, at El Paso Sitting.

THE EL PASO WATER COMPANY
vs.
THE CITY OF EL PASO. } In Equity.

The El Paso Water Company, a private corporation created and organized under and by virtue of the laws of the State of Kansas and whose principal place of business is in said State of Kansas, brings its supplemental bill against The City of El Paso, a municipal corporation situated in the county of El Paso and the said western district of Texas.

And thereupon your orator complains and says that it filed its original bill against the defendant in this court on the 29th day of October, A. D. 1889, wherein it prayed for an injunction on final hearing to restrain the said defendant from establishing, maintaining, or operating any water works within the limits of said city, and from selling or negotiating any bonds or other securities for that purpose, and for other relief, as stated in its original bill, which said bill has been amended by amended bill filed March 22nd, A. D. 1890; and your orator further shows that since the filing of his said original bill, to wit, on the 20th day of January, A. D. 1890, the city council of said city of El Paso passed and adopted an ordinance (which was approved on said date) by which they ordered issued seventy-five thousand dollars in the coupon bonds of said city of the denomination of one thousand dollars each, to be known and styled on their face as El Paso city water-works construction bonds; that said bonds were ordered issued for the purpose of selling same and of using the proceeds thereof in purchasing, erecting, and completing suitable water works for said city, and that said ordinance further provided, among other things, that it should take effect after a majority of the ad valorem tax-payers of said city should vote in favor of said bonds. The said certified copy of said ordinance is hereto annexed, marked Exhibit A, and prayed to be taken and considered as a part of this supplemental bill.

And your orator further shows that the said city council, by an ordinance duly passed, and approved on the 20th day of January, A. D. 1890, directed the mayor of said city to order by proclamation an election to be held in the various wards of said city, on the 21st day of February, A. D. 1890, for the purpose of having the ad valorem tax-payers of said city to vote on the question of issuing said bonds for the purpose of purchasing or constructing suitable water works for said city, a certified copy of which said ordinance is hereunto annexed, marked Exhibit B, and prayed to be taken and considered as a part of this supplemental bill.

Your orator further shows that said election was held and returns thereof made in accordance with the provisions of the charter of said city directing the manner of holding and making returns of elections; that thereafter, on the 22nd day of February, A. D. 1889, the

said council, at a meeting convened for that purpose, opened and canvassed said returns and declared the result of said election. Three hundred and sixteen votes were cast in favor of the issuance of said bonds and twenty-one votes were cast against the issuance thereof; and that the said city council, having ascertained and declared the result of said election, as above stated, the same being the result as shown by the face of said returns, further declared that the ad valorem tax-payers of said city had at said election, by a majority of their votes, ratified the action of said council in authorizing the issuance of said bonds, all of which action of said council will more fully appear by reference to the certified copy of the proceedings of said council, as shown on the minutes thereof, which copy is hereunto annexed, marked Exhibit C, and prayed to be taken and considered as a part hereof.

24 And your orator further shows that of those who voted in said election, as shown by the poll-lists prepared and returned by the managers thereof as required by law, there were eighty-five whose names do not appear on the tax-roll kept by the city assessor of said city; that the city council, in making the aforesaid declaration, based its judgment and decision upon a comparison of the number of votes cast for said bonds with the number of ad valorem tax-payers shown upon said rolls—that is to say, having first determined that there were five hundred and thirty ad valorem tax-payers shown upon said rolls, it, the said council, determined that the number of votes cast for said bonds, to wit, three hundred and sixteen, constituted a majority of such tax-payers; all of which appears in said Exhibit C.

But your orator here charges that if the eighty-five voters in said election whose names do not appear on said rolls be deducted from the total number of votes cast at said election, which it respectfully submits must be done if the rule of decision adopted by said council be correct, there will remain only two hundred and fifty-two votes, or thirteen less than a majority of the ad valorem tax-payers of said city, as shown upon said rolls.

But your orator shows that in fact fifteen of the aforesaid eighty-five voters were in fact ad valorem tax-payers, although their names do not appear on said rolls, and these should be added to the number of tax-payers in said city; that thus it will appear that at the time of said election there were in said city five hundred and forty-five ad valorem tax-payers; that it therefore required the votes of at least two hundred and seventy-three ad valorem tax-payers to ratify the action of said council and authorize the issuance of said bonds; that seventy of the persons who cast votes in favor of said bond issue were not shown on said rolls to be and were not in fact ad valorem tax-payers, the names of which seventy persons are shown in the list hereunto annexed, marked Exhibit D, and made a part thereof; that if such seventy votes be deducted from the number of votes cast as aforesaid for said bonds there will remain two hundred and forty-six as the number of ad valorem tax-payers who voted in favor of said bonds, or twenty-seven less than a majority of the actual resident ad valorem tax-payers of said city.

Your orator therefore charges that the action of said council in

authorizing the issuance of said bonds was not ratified as the charter of said city requires—that is, by a majority of the ad valorem taxpayers thereof; that said bond issue was in fact disapproved and defeated at said election, and that the aforesaid declaration of said council was unwarranted by law and was and is null and void.

And your orator further charges that the aforesaid bonds were ordered issued in furtherance of the determination of said city council to deprive your orator of its rights and privileges, as set forth in said original and amended bills, and that they and the bonds mentioned in said original and amended bills were so ordered issued in pursuance of the same general plan and purpose on the part of said city council to establish, maintain, and operate a system of water works in said city in disregard of your orator's said rights and to the destruction of its property in said city; and your orator adopts all of its allegations in its said original and amended bills contained, and particularly shows that it has no legal remedy against the aforesaid unlawful and wrongful declaration of the result of said bond election; that it is remediless if the injunction hereinafter prayed for is denied.

Your orator further shows that since the filing of its said original bill J. P. Dieter has been elected and has qualified and is now acting as alderman in and for the fourth ward of said city in place of J. P. Hague, whose term of office expired, and that he, the said Dieter, and the other aldermen (or councilmen) mentioned in said original bill (except said Hague), together with the said Richard Caples, mayor, constitute the city council of said city.

Wherefore your orator prays for service on said aldermen and mayor that the matters hereinbefore alleged be fully investigated, particularly the validity of said election be inquired into, and the qualifications of the electors thereat; that the ballots be recounted, after rejecting all illegal votes, and the exact state of the polls ascertained; that said declaration be set aside and vacated or be decreed to be null and void for the reasons in said original and amended bill as well for those hereinbefore alleged; that the issuance of said bonds be perpetually enjoined on final hearing.

Your orator further prays for all general relief.

NUGENT & STANTON,
Sol's for Pl'ff.

Thereafter, on the 9th day of April, A. D. 1890, the said defendant, The City of El Paso, filed in said cause her demurrer to complainant's original and amended bill, which is in words following, to wit:

Circuit Court of the United States for the Western District of Texas, April Term, A. D. 1890, at El Paso Sitting.

THE EL PASO WATER COMPANY
vs.
THE CITY OF EL PASO. } No. 11. In Equity.

The demurrer of The City of El Paso, defendant, to the bill of complaint, original and amended, of The El Paso Water Company, the above-named plaintiff.

The defendant, by protestation, not confessing all or any of the matters and things in plaintiff's bill of complaint, original and amended, contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, original and amended, and for cause of demurrer showeth—

That the said supplemental bill, original and amended, doth not contain any matter of equity whereon this court can ground any decree or give to plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer *offering* in said supplemental bill (original and amended), the defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer thereto, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

A. G. FOSTER,
City — of El Paso, or Counsel for Defendant.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, A. G. Foster, counsel for the above defendant, certify that in my opinion the foregoing demurrer is well founded in point of law.

A. G. FOSTER,
City Att'y, or Counsel for Defendant.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, Richard Caples, do solemnly swear that I am the mayor of The City of El Paso, defendant, and that the foregoing demurrer is not interposed for delay.

RICHARD CAPLES.

26 Sworn to and subscribed before me this the 9th day of April, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk U. S. Cts.

And on the same day, to wit, on the 9th day of April, A. D. 1890, the said defendant filed in said cause her demurrer to complainant's supplemental bill, which is in words following, to wit:

Circuit Court of the United States for the Western District of Texas, April Term, A. D. 1890, at El Paso Sitting.

THE EL PASO WATER COMPANY
vs.
THE CITY OF EL PASO. } No. 11. In Equity.

The demurrer of The City of El Paso, defendant, to the supplemental bill of complaint of The El Paso Water Company, the above-named plaintiff.

The defendant, by protestation, not confessing all or any of the matters and things in plaintiff's supplemental bill of complaint to be true in such manner and form as the same is therein set forth and alleged, doth demur to said supplemental bill, and for cause of demurrer showeth—

That the said supplemental bill doth not contain any matter of equity whereon this court can ground any decree or give to plaintiff any relief against the defendant.

Wherefore, and for divers other good causes of demurrer appearing in said supplemental bill, the defendant doth demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer thereto, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) A. G. FOSTER,
City Attorney of El Paso, or Counsel for Defendant.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, A. G. Foster, counsel for the above-named defendant, certify that in my opinion the foregoing demurrer is well founded in point of law.

A. G. FOSTER,
City Att'y, Counsel for Defendant.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, Richard Caples, do solemnly swear that I am the mayor of the city of El Paso, defendant, and that the foregoing demurrer is not interposed for delay.

RICHARD CAPLES.

Sworn and subscribed to before me this 9th day of April, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk U. S. C.

27 And the said demurrer having been heard and determined by said court on the 22nd day of April, A. D. 1890, thereupon the said court, on said last-mentioned date, made the following decree and order allowing appeal, which was duly entered of record in the minutes of said court, to wit:

THE EL PASO WATER COMPANY
vs.
THE CITY OF EL PASO. } No. 11. In Equity.

This cause coming on to be heard upon the defendant's demurrer to the complainant's original, amended, and supplemental bills, and the court, having heard the argument of counsel and being now thereof sufficiently advised, doth order, adjudge, and decree that the said demurrer be, and the same is hereby, sustained; and, the complainant not desiring to amend, it is further ordered, adjudged, and decreed that the said original, amended, and supplemental bills be, and the same are hereby, dismissed, and defendant recover all costs; and the complainant having prayed in open court an appeal from this decree to the supreme court, the same is in open court allowed, as prayed for, this 22nd day of April, A. D. 1890.

T. S. MAXEY, *Judge.*

Thereafter, to wit, on the 5th day of May, A. D. 1890, the said complainant filed in said cause its appeal bond, which is in words following, to wit:

Circuit Court of the United States of America for the Western District of Texas, in the Fifth District.

THE EL PASO WATER COMPANY, Appellant,
vs.
THE CITY OF EL PASO, Respondent. } No. 11.

Know all men by these presents that we, The El Paso Water Company and Wm. S. Hills & Samuel Schutz, of the city and county of El Paso and State of Texas, are held and firmly bound unto the above-named The City of El Paso in the sum of five thousand dollars, to be paid to the said The City of El Paso; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named The El Paso Water Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the western district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named The El Paso Water Company shall prosecute its said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE EL PASO WATER COMPANY, [SEAL.]
By it Attorneys, NUGENT AND STANTON.
WILLIAM S. HILLS. [SEAL.]
SAMUEL SCHUTZ. [SEAL.]

Sealed and delivered & taken & acknowledged this 29th day of April, A. D. 1890, before me—

JAS. D. McKIE,
U. S. Commissioner, Western Dist. of Texas.

The foregoing bond is this day approved, May 3, 1890.
T. S. MAXEY, *Judge.*

I, Geo. Wythe Baylor, clerk of the circuit court of the United States of America and western district of Texas and fifth
28 cir't, do hereby certify that William S. Hills and Samuel Schutz, of the city and county of El Paso and State of Texas, are to me well known and every way responsible as securities on the bond given in the case above numbered and named.

In testimony whereof I have caused the seal of the circuit court of the United States for the western district of Texas to be hereunto affixed this the 29th day of April, A. D. 1890, and the 114th year of the Independence of the United States of America.

GEO. WYTHE BAYLOR,
[SEAL.] *Clerk of the U. S. Cir. C't.*

29 In the United States Circuit Court for the Western District of Texas, at El Paso.

I, George Wythe Baylor, clerk of the United States circuit court for the western district of Texas, at El Paso, do hereby certify that the foregoing is a full, true, and correct transcript of the records of my office in a suit now pending in the above-named court in case No. 11, equity, and styled The El Paso Water Co. *vs.* The City of El Paso; all of which appears from the records of said court now in the clerk's office.

The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.

In testimony whereof I hereunto affix the seal of said court, at El Paso, Texas, and sign the name of the clerk thereof, this 26th day of May, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk of said Circuit Court,
By —— ——, *Deputy Clerk.*

[Endorsed:] No. 11. Equity. United States circuit court, western district of Texas, at El Paso. The El Paso Water Co. *versus* The City of El Paso. Certified copy of proceedings in this cause for Supreme Court. Fee, $16.40.

Endorsed on cover: W. Texas C. C. U. S. No. 1385. The El Paso Water Company, appellant, *vs.* The City of El Paso. Filed October 13, 1890.

Office Supreme Court U. S.
FILED
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JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE EL PASO WATER COMPANY,
Appellant,

vs.

THE CITY OF EL PASO,
Appellee.

WALTER D. DAVIDGE
and LEIGH CLARK,
Solicitors for the City of El Paso, Appellee.

R. O. Polkinhorn, Printer, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE EL PASO WATER COMPANY,
Appellant,

vs.

THE CITY OF EL PASO,
Appellee.

Motion to Dismiss or Affirm.

The appellee in the above entitled cause moves the Court to dismiss the appeal because the matter in dispute does not exceed the sum of five thousand dollars, and further moves the Court to affirm the decree appealed from because it is manifest it is without merit and taken for delay only.

WALTER D. DAVIDGE
and LEIGH CLARK,
For Motion.

Statement of the Case.

The city of El Paso, a municipal corporation, was duly authorized by its charter and the general laws of Texas to supply the city with water. (R. 1, 9, 10.)

On the 24th of August, 1889, the city passed an ordinance authorizing the issue and sale of bonds for $25,000, and declaring that the proceeds from the sale of such bonds shall be used for the purpose of sinking artesian wells and providing water works for said city. (R., 7, 8).

On the 20th of January, 1890, the city passed a further ordinance for the issue and sale of bonds for $75,000, declaring that the proceeds from the sale of said bonds shall be used for the purpose of purchasing or erecting and completing water works for said city. (R., 23, 24).

On the 7th of May, 1881, the city entered into a contract with the El Paso Water Company, a domestic corporation of the State of Texas, whereby the said company was granted the sole and exclusive right and authority for the period of fifteen years, from the 1st of September, 1882, to supply the city with water. (R., 1, 2, 11). This contract was assigned on the 29th of April, 1882, to one, Sylvester Watts, and after such assignment, the appellant was incorporated and organized under the laws of the State of Kansas; and thereupon, Watts, on the 16th of August, 1882, assigned to the appellant (R., 1, 2, 14); both assignments are averred to have been with the knowledge and acquiescence of the city (R., 14), and it is further alleged that the city approved and ratified the contract in favor of the appellant. (R.16).

It is also alleged that the appellant, in the execution of the contract, expended large sums of money in the construction of water works and the necessary appliances, and erected hydrants along the streets, from which hydrants alone it was entitled to receive during the fifteen years a rental of $3,460 per annum.

On the 29th of October, 1889, shortly after the passage of the first ordinance for the issue and sale of bonds the appellant filed its bill to enjoin the appellee from establishing or operating any water works within the limits of said city until said period of fifteen years shall expire, and from selling or negotiating any bonds or other securities for that purpose (R., 3); and on the 22d of March, 1890 (R., 4) the appellant filed an amended bill.

By the amendment of the charter of the appellee approved the second of March, 1889, power was specifically given to borrow money upon the credit of the city for the purpose of supplying the city with water and providing water works and other permanent public improvements, and to issue coupon bonds for the money so borrowed, but it was provided that no bond should be issued unless ordered by the city council at a regular meeting thereof, by a two-thirds vote of all the members elected, nor until the action of the said council should be ratified by a majority of the advalorem tax-payers of the city at an election held for the purpose of determining whether or not the bonds should be issued (R., p. 10). The original bill had conceded that the ordinance had been duly passed by the City Council and expressly averred that the action of that body had been ratified by a majority of the advalorem tax payers (R., 3).

The amended bill, after reiterating with infinite prolixity the averments of the original bill in other respects, withdraws the averment in that bill as to the ratification of the action of the City Council by a majority of the *ad valorem* tax payers at said election, and prays that the election may be inquired into, and the ballots recounted after deducting all illegal votes (R., 18, 19, 20).

By the above amendment of the charter, the duty of canvassing the votes and declaring the result of such election was devolved on the City Council. Such duty was discharged as to both elections (R., 6, 22,) and the amended bill thus collaterally impeached the act of the City Council.

The amended bill further alleges (R., 20,) that the Appellant pays annual taxes on its property to about the sum of $586, and that if the bonds are issued, it will have to pay its proportion of interest on the bonds and to provide the sinking fund called for by the ordinance (R., 8, 24), and prays relief as in its original bill. After the passage of the second ordinance a supplemental bill was filed on the 27th of March, 1890, (R., 21), praying the same relief and on the same ground as was sought by the original and amended bill, as to the first ordinance.

A general demurrer was filed (R., 28, 29), and the bills dismissed.

The Matter in Dispute.

To give jurisdiction to this Court it must appear affirmatively that the matter in dispute exceeds the sum or value of five thousand dollars.

The bill is essentially a private bill for the redress of a private wrong, filed by the appellant alone for the protection of its private interests. The appellant does not profess to act for the benefit of the public in behalf of a class, such as property holders or tax payers who will be injured by the consummation of alleged illegal act. The exclusive object of the bill is the prevention of special damage to the appellant. In such a case the matter in dispute is not the amount involved in the illegal act sought to be enjoined, but the interest of the party in the prevention of such illegal act, or in other words the special damage accruing. If such interest does not exceed five thousand dollars the case cannot be litigated in this forum.

Market Co. vs. *Hoffman*, 101 U. S., 112;
Crampton vs. *Zabriskie*, 101 U. S., 601;
Seaver vs. *Bigelow*, 5 Wall., 208;
Russell vs. *Stansell*, 105 U. S., 303.

What, then, is the pecuniary interet of the appellant in this suit as alleged?

It is evident that such interest does not include any damage by reason of the violation of its contract with the appellee—the contract is averred to be a valid one, and that the city has continued to make payments in compliance with the contract (R., p. 18); no breach of the contract is averred, and the bill is not brought to affirm or enforce the contract; this is demonstrable by a careful examination of the averment of the bills.

The contract is specifically averred to be, "*the sole and exclusive right, warrant and authority for the period of fifteen years to manufacture, sell and furnish water to the inhabitants of El Paso, to both public and private buildings, within the corporate limits of said city.* (R., 1, 2.)

The relief prayed, is that the appellee "*be enjoined and perpetually restrained from establishing, maintaining or operating any water works within the limits of said city until said period of fifteen years shall expire, and from selling or negotiating any bonds or other securities for that purpose* (*R.*, 3, 4).

It is thus apparent that by the contract as alleged the appellee did not bind itself not to do that which is sought to be enjoined, and that which is sought to be enjoined, is in no respect in violation of the contract. The appellee had a perfect right the day after the contract, to do the very thing which is sought by injunction to be prevented.

The fact that appellant was entitled to supply water for fifteen years did not deprive the appellee of the right, nor indeed absolve it from the duty of making proper provision for the supply of water after that time. There is no conceivable repugnance between the right of the appellant to supply water, and the right of the appellee to build water works; both rights co-exist in perfect harmony, and there is no averment to the contrary.

The amended bill avers that the period of fifteen years began to run on the first day of September, 1882, (R. 17); hence, when the first bond or ordinance was passed, and the original bill was filed (R. 1.), seven years of that period had elapsed.

As it is not averred that the action of the appellee violated the contract of the appellant, so it is not pretended that such action endangered, in any manner, the consideration to which the appellant was entitled under the contract. It is nowhere averred or pretended that the appellant, by the action of the appellee, will be deprived of the benefit bargained for by the contract, or any part of such benefit. Indeed, the appellant, performing the contract; or being prevented from such performance by the appellee, has a right of action at law to recover the consideration provided by the contract. The appellant is satisfied with its contract, alleges that it is valid and binding, and that the appellee; in divers ways, has ratified and affirmed it (R., 16), and it does not in this proceeding ask that it be affirmed or enforced.

As with the contract so with the plant; it may be that with the termination of the contract the plant will be less valuable; but such loss is attributable to the voluntary act of the appellant in entering into the contract and providing the plant to carry it out, and the case is not helped as to matter in dispute by general averments as to irreparable injury to contract and plant. (R., 3). Such averments containing no facts from which the court can infer such injury, are not well pleaded and were not admitted by demurrer. They give only the opinion of the pleader, and in the present case are absolutely without meaning, because contradicted by specific averments and the case made by the appellant. So also with regard to the purpose imputed to the appellee. (R., 3, 20.)

If the mattter in dispute does not include damage in respect of the contract or plant, the purpose of

the appellee as to either is wholly immaterial. It is, however, worthy of remark that there is not alleged any purpose on the part of the appellee to supply the city and its inhabitants with water within the contract term of fifteen years.

2. As this case stood on the original bill there was plainly no matter in dispute the value whereof could give jurisdiction to this court. The amended bill introduced a new element, that is, that the ordinances were not duly ratified by a majority of the advalorem tax payers. The amended bill avers (R., 20), that if the bonds are issued the appellant "will be compelled to pay taxes on said property proportionally, to pay the interest on said bonds, and provide a sinking fund to pay the principal thereof." It may be contended that the appellant avers an interest in preventing the increased taxation. But this does not improve the case of the appellant; the question recurs as to the value of such interest, whether it exceeds the sum of five thousand dollars, and such value is neither averred nor are facts stated from which it can be inferred. How much of the fund to be annually raised to pay interest and provide a sinking fund would fall upon the appellant it is impossible to say from the record. The appellant's share of the increased taxation would depend on many circumstances, which are not divulged, against the tax would be set off the income from the water works (see ordinances, R., 5. 24) and it is not possible to say what that will be; besides, the appellant may dispose of its property. The second ordinance makes provision for, either the building of new water works or purchasing those of the appellant. So far from the contemplated public im-

provement being a detriment to the property of the appellant it may add to its value, and there is no averment to the contrary. But enough has been said to show that the value of the interest of the appellant in respect of its increased share of taxation, is purely conjectural and speculative.

This is not what the law requires; and this court will not proceed unless its right and duty to do so are apparent upon the face of the record.

Elgin vs. *Marshall*, 106, U. S., 581.

And upon its motion to affirm, the appellee submits that its general demurrers to said bills of complaint were properly sustained, for the reason,

That it is provided by the Texas Constitution "That perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed" (Const. of Texas, 1876, Art. I., Sec. 26, p. 3, R. S., Tex., 1879), and this Constitution, antedating the alleged contract of the Water Company, appellant, it, as well as the then existing laws of said State, became a part of said contract.

Is the contract in question inhibited by the above cited provision of the Texas Constitution?

In the case of the *City of Brenham* vs. *The Brenham Water Company*, 4 S. W. Rept., p. 143, the Supreme Court (the highest court) of the State of Texas, in construing the above constitutional provision, held that the contract of the Brenham Water Co. (which contract was in all substantial particulars similar to that of the El Paso Water Company, now in question) was inhibited by the constitution, and "that neither the City Council nor the Legislature had power to make or authorize such contract," and, as

the opinion of the Supreme Court in the Brenham case so thoroughly deals with the question, now here presented on demurrer, we copy such opinion, and adopt it as our argument herein.

In delivering the opinion of the Court, it was said by

STAYTON, J. On August 18, 1884, the city of Brenham passed an ordinance, which provided that an association of persons, then unincorporated, known as "Brenham Water Company," should have the right to establish, construct, and operate a system of water-works in or adjacent to the city, and for this purpose to use all the streets, alleys, lanes and public grounds, and all places under the control of the city, so far as might be necessary for the proper conduct of the business, "and for supplying said city, and the inhabitants thereof, with fresh water for domestic, manufacturing, fire and other purposes." The length of mains and pipes to be first established was fixed at not less than four miles, to be located as might be agreed between the company and the city, which were required to be extended as the city might order to be done. The seventh section of the ordinance determined the capacity the water-works were required to have, and the eighth section gave the city the right to use water for public purposes other than the extinguishment of fires, which the city was to receive in full payment for all municipal taxes during the full term for which the contract was to run. The ninth section reserved to the city the right to purchase the water-works after the expiration of 10 years, at such price as might be agreed upon by persons to be selected as therein provided, whose appraisement was to be binding upon both parties. Section 1 was: "That there is hereby given and granted to Brenham Water Company the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham, and the inhabitants thereof,

with water for domestic or other uses, and for the extinguishment of fires." The fifth section is as follows: "The said city of Brenham hereby agrees to rent, and does rent, of the said Brenham Water Company, 35 double-nozzel fire hydrants, located, by authority of said city, upon the mains and pipes within said city, for the extinguishment of fires, at a rental of $3,000 per annum, payable quarterly on the first day of January, April, July and October in each year. The said rental shall commence when the city is notified that the said hydrants are ready for use and shall continue during the full term specified in this ordinance; and for the purpose of providing for the payment of all hydrant rental becoming due, under the provisions of this contract, the city council shall levy, collect, and appropriate annually a sufficient sum of money to cover the amount becoming due on this contract." The sixth section provided that "the said Brenham Water Company shall meke all extensions of mains and pipes whenever the said city council shall order the same to be done, and shall erect not less than at the rate of ten double nozzel fire hydrants to the mile on such extensions, for which hydrants the said city of Brenham shall pay a rental of $60 each per annum, payable as provided in section 5." The thirteenth section fixed the water rate which might be charged to inhabitants in most of the matters and business that could be enumerated, but as to some enumerated, and those not enumerated, the charge was left to be fixed by contract to be made with the superintendent, and all rates were made payable quarterly in advance at the office of the corporation. The fourteenth section provides that "this ordinance shall be a contract by and between the city of Brenham and the Brenham Water Company, their successors and assigns, and shall be binding on both parties thereto, provided said company shall file with the city clerk its acceptance of the same in writing within five days after the passage of the same. The water company's acceptance was filed as required by the ordinance.

Before the first of June, 1885, the persons composing the Brenham Water Company incorporated under the same name, under the general incorporation act, and on that day the city was notified that the works were ready for use; but it was found that the water-supply was not sufficient; wherefore the water company asked the acceptance of the works by the city, agreeing to give an additional supply of water equal to that they were then able to furnish, and to increase it as the consumption demanded it; to keep on hand such fuel as would enable it at all times to speedily put the pumps in motion in case of fire; to keep and maintain a telephone; to pump the stand-pipes full every day, and to bank the fires under the boilers; to allow the fire department to fill the fire cisterns from any of the hydrants; and "to adopt and enforce strict rules and regulations for the faithful carrying out of the purposes for which it is intended, and to use every diligence to give to the city of Brenham good and efficient fire service." The city, on the same day, accepted the water-works under the terms of the agreements then tendered; and, in its ordinance so accepting, it provided "that no payment shall be made on said contract if the said company does not comply with its agreements hereinbefore recited, but, on compliance therewith, the payments shall be made, commencing on the first day of June, 1885." The ordinances did not give to the city the power to regulate and control the water-works, and to make them effective in case the water company failed to do so.

This action was brought to recover the price stipulated for the use of hydrants for the time intervening June 1, 1885, and January 1, 1886. The ordinance was made a part of the petition.

The city filed defenses, thus summarized, in the brief of its counsel, correctly:

"(1) A general demurrer.

"(2) That it appeared from the petition that the contract sued upon created a monopoly and perpetuity in plaintiff.

"(3) By special exception that no authority to make said contract was therein alleged.

"(4) that it appeared from said petition that the city council had rented the hydrants for a period of twenty-five years, at the yearly rental of three thousand dollars, and no authority was alleged in the council to bind the city for such a period of time.

"(5) A general denial.

"(6 and 7) That said contract was inoperative, against public policy, and void, because—*First*, the city of Brenham, having less than ten thousand inhabitants, was prohibited by the constitution and laws of the state from levying for city purposes more than twenty five cents on the one hundred dollars valuation, on the property subject to taxation, and at the date of said contract the current expenses of the city, including salaries of officers and other reasonable and necessary expenses, annually incurred, exceeded the revenue derived from said tax; that there was no excess in any fund which could be appropriated to the payment of the rent of said hydrant, and the council, having no means to pay said rent, and having exhausted the limit of taxation allowed by law, were not authorized to contract said debt; that at the date of the contract the entire available current revenue of the city, out of which the expenses incurred by said contract could be paid, amounted to the sum of $8,763.31, an itemized statement of which is given, while the current expenses amounted to the sum of $12,942.14, an itemized statement of which is given; that these expenses, exceeding all the available revenues of the city, render the contract inoperative, illegal, and void.

"(8 and 9) That the contract was an attempt on the part of the council to surrender their legislative discretion, and barter away the power conferred upon it by law, and was contrary to public policy.

"(10) That the contract, under the pretense of obtaining water for the city, was in truth and in fact a donation.

"(11) That the price stipulated was so extortionate, unreasonable, and oppressive as to render said ordinance void.

"(12) That said contract exempted the property of plaintiff from the payment of city taxes during the term of twenty-five years, and was in violation of law which prohibits the council from appropriating the school tax and other special taxes to any fund other than that for which it was levied, and was therefore illegal.

"(13) The defendant specially denied that plaintiff complied with its undertakings, in consideration of which the promises of the defendant were made, particularly in reference to the quantity or supply of water to be obtained, and quality of the pipes and mains furnished by the company.

"(14) That for these reasons, among others, the council, on the tenth day of July, 1885, adopted "an ordinance rescinding the contract with the Brenham Water Company, made August 18, 1884, and the supplemental contract made June 1, 1885, and repealing certain sections of the said ordinance entitled 'An ordinance to provide a system of water-works for the city of Brenham,' &c. The sections of said ordinance so repealed were all sections which required the water company to furnish water to the city for any purpose, or authorized the payment of plaintiff therefor in the amount claimed in the suit; that the sections in the ordinance excepted in said repealing ordinance were the sections which gave the plaintiff the right and privilege of supplying water, and the provisions therein for the enjoyment and protection thereof; that this ordinance of July 10th is a bar to plaintiff's action.

"(15) That, at the date of the contract, there was no such corporate body in existence as the Brenham Water Company; that the pretended existence of such contract at the date of said contract was false and fraudulent.

"(16) That the said company, through its agents, falsely represented to and assured the council, as an

inducement to the contract, that the system of waterworks would secure a general reduction in premiums paid for insurance, and that the amount saved in this way would be greater than the amount expended for water, and that, instead of such reduction, the rates have been increased.

"(17) That the supplementary contract of June 1st was made by the council while acting under a mistake of existing facts, and was obtained through the false representations of W. C. Conner, an agent of plaintiff; that the council was not afforded any opportunity of inspecting the mains and pipes then under ground, and inaccessible, and in the possession of plaintiff, and the defects were of such a character as to render it impossible to discover them by any means available to the council, and that Conner represented that they were sufficient in every respect for the purposes designated, and that the council was misled by the fraudulent defects in said mains and pipes; that, by reason of his false statements and misrepresentations, the alleged ordinance of acceptance was fraudulent."

The court sustained demurrers to so much of the answer as alleged that the contract created a debt in excess of the sum the city was authorized to raise by taxation, and to so much as set up the ordinance of July 10, 1885, rescinding the contract on which this action was based, and overruled the defendant's demurrers to plaintiff's pleadings. The evidence introduced under the thirteenth, sixteenth, and seventeenth paragraphs of the defendant's answer was conflicting. There was a verdict and judgment for the plaintiff.

The first assignment of error is that "the court erred in overruling defendant's demurrer alleging, as objections to plaintiff's original and supplemental petitions—*First*, (one of the assignments of error was) that the contract sued upon created a monopoly and perpetuity; *second*, that no authority was shown in the city council making the contract to bind the city for a period of twenty-five

years, and the attempt to do so was invalid, because the council could not to that extent surrender its legislative discretion and barter away the authority reposed in it by law; *third*, because the contract was an attempt upon the part of the council to limit the legislative authority of their successors, and embarrass them in the exercise of their exclusive discretion."

The city of Brenham was incorporated under a special law approved February 4, 1873, and the first section of its charter declares that it shall "be capable of contracting and being contracted with." Section 5 of article 24 of the charter gives the city power "to provide the city with water; to make, regulate and establish wells, pumps, and cisterns, hydrants, and reservoirs, in the streets or elsewhere, within said city, or beyond the limits thereof, for the extinguishment of fires, and the convenience of the inhabitants, and to prevent the unnecessary waste of water." These are the only parts of the charter which have any bearing on the questions raised by the assignments.

The law under which the Brenham Water Company was incorporated provides that "any gas or water corporation shall have full power to manufacture, and to sell and to furnish, such quantities of water or gas as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, alleys, lanes, and squares in such city, town, or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe." Rev. St. art. 629. "The municipal authorities of any city, town, or village, in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares, and public places in any such city, town, or village." Rev. St. art. 630. All these

laws may be looked to in determining the power of the city to make the contract involved in this case, though, did it depend solely on the ordinance of August 18, 1884, and its acceptance, articles 629 and 630 of the Revised Statutes would not, in terms, be applicable.

Taking all the laws into consideration, we cannot doubt the power of the city to make some contract through which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rites of the parties depend. The subject-matter of the contract is one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period of 25 years. Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, surroundings of the parties, and purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefore to receive certain benefits, for a quarter of a century; *i. e.*, to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period. It not only professes, in general terms, to confer such a right, but as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a "privilege." The word "privilege," as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, when used in the sense of "priority," but was intended to be given its ordinary signification,— meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. This right is to supply the city and its in-

habitants with water for their varied uses, for 25 years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word "supplying" must be considered in its connection, with a view to ascertain whether it was used in its primary sense, or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed necessary to be furnished through such a system. In the ordinance under consideration, it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city, through its charter, and this for the period of 25 years. It would do violence to the context to give to the word any other meaning.

If nothing more appeared than we have considered, to give character to the contract, and to illustrate the nature of the right intended to be secured through it, it seems to us that there is no escape from the conclusion that the parties contracted, and intended to contract, that the right of the water company should be exclusive. The fifth and six sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains, which it absolutely agreed to put down, and for the use of these the city agreed to pay the sum of $3,000 per year for the period named. It further obligated itself to extend its mains, if requested to do so by the city, and upon each mile of such extension to erect not less than 10 fire hydrants, for each one of which the city promised to pay a rental of $60 per annum, as provided in the fifth section. Was the city, in this and in another part of the ordinance to which we have referred, agreeing to receive, and the company to furnish, the entire quantity of water to be used for fire and other enumerated public purposes during

the 25 years? The contract, in terms, obligated the city to pay for this for the full period, whether it used the water or not, and thus made the only right valuable to the water company in so far exclusive.

If the city refused to take the water, and obtained it elsewhere, if the contract was valid, and the parties are to be supposed to have so considered it, then the city would but assume a double burden, which it can not be conceived that the city ever contemplated. The language of the contract, the surroundings of the parties, and their evident purpose, forbid the belief that they either intended to make the right and privileges of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of water-works for the full period of 25 years. Does the charter of the city of Brenham, or that of the water company, confer upon the city the power to make such a contract? Both charters may be considered together. The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. The charter of the water company expressly conferred upon it power to contract with the city to supply it with water for public purposes. Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them. The summary of powers which a municipal corporation has and may exercise, as given by Mr. Dillon, was recognized as correct in the case of *Williams* v. *Davidson*, 43 Tex., 33. "*A municipal corporation possesses and can exercise the following powers, and no others: First*, those granted in *express words; second*, those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted, *third*, those essential to the declared objects and purposes of the

corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Dill. Mun. Corp. 89.

No express power is conferred upon the city, though either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exculsive rights to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. Under charters containing grants of power less full and express than are contained in the charter of the city of Brenham, it has been held that power existed to erect and operate water-works under the control and ownership of the municipality when it deemed it necessary to the public good. The legislature had given power to the city of Brenham to erect, control, and regulate water-works, and this it may exercise, if it has or may have the pecuniary ability, unless constrained by the contract under consideration. The legislature has also given power to every city within which one or more private corporations may have water-works to contract with one or all of them, and the further power to permit the use of its streets and other public grounds for the purposes of such works contemplated by the statute, by as many water companies as may desire to do so. Rev. St., arts. 629, 630, 3138.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." Dill. Mun. Corp. 97. Whether and

how a municipal government will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the means to carry out such legislative determination, the making of one or many cantracts may become necessary. The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had expressly authorized the mak ing of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law,—a matter which will be considered hereafter,—and the ordinance could not be held to operate, considered with its acceptance as a contract, as a surrender of any power the legislature intended the city government to exercise at all times. The question would then have been determined by a power superior to that of the municipality,—a power from which it derives all the power it has, and even its existence as a corporation.

The city having been given such power as we have stated, it must be understood that it was intended, not only that it might use it, but that it should use it, if deemed necessary, for the public welfare, so long as the power is possessed by it, *i. e.*, until taken away by the legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain, and regulate water-works was given to it? It seems so to us; for, as we have before said, the contract, in effect, assumes to give an exclusive right,—assumes to surrender to a private corporation, for the period of 25 years, the power which the legislature conferred on the municipal government. The power given to a municipal corporation to con-

tract in relation to a given subject-matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it. If it is invalid, the city council had the right to declare it null, and to refuse to comply with it.

In the case of *Gas-Light Co.* vs. *Middletown*, 59 N. Y., 231, the town authorities were empowered to cause the streets to be lighted with gas; and were required, when they deemed it necessary to do so, to contract with the gas company to furnish and lay down gas-pipes, erect lamp-posts, and other necessary things, and to furnish gas. Under these facts the authorities contracted with the gas company to furnish gas and light certain streets for the term of five years. Subsequently the law which conferred authority on the town to make the contract was repealed, and an action was brought to recover for gas furnished after the repeal, and it was held that the contract was invalid on the ground that such a contract could not deprive the legislature of its power to repeal the law affecting a municipal corporation. It is said: "If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with plaintiff for that time, it might for 100 years, by contracting for that period. I think it entirely clear that no such power was conferred by the act on the town auditors."

A contract made with a municipal corporation is no more beyond its control, if its effect be to withdraw from or embarrass the municipality in the exercise of any legislative power conferred upon it, than is such a contract beyond the reach of the legislature that created the municipal corporation. It is solely the want of power to make the contract which authorizes either body to disregard it.

In the case of *State* vs. *Gas-Light Co.*, 18 Ohio St. 291, it appeared that the gas company had a charter which empowered it, within the city of Cincinnati, to do all the acts which gas companies, incorporated under the general laws of this State, are authorized to do, including the right to sell gas to the city and its inhabitants. The city of Cincinnati was also authorized, by its charter, to contract with gas companies for lighting its streets, and to levy taxes to meet the expenses. So standing the charters, with the consent of the city, the gas company acquired all the rights which the city had contracted to permit an individual to enjoy. That contract embraced substantially the same rights and privileges as the contract before us professes to give to the plaintiff, and these were to be enjoyed for 25 years. The contract was held to be invalid. Waiving a consideration whether the legislature of the State might have granted such rights and privileges, the court said: "Assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and it is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In the case of *Garrison* vs. *City of Chicago*, 7 Biss., 486, it appeared that a gas company, having corporate powers as broad as any the plaintiff can claim under its charter, contracted with the city of Chicago to supply it with gas for the period of 10 years. The power of the city to buy gas, under its charter, was as full as is the power of the city of Brenham to con-

tract for a water supply, and it was held that the city had no power to contract for so long a time. In disposing of the case it was said: "The officers of the city—the members of the council—are trustees of the public. There can be no doubt that the right to regulate the lighting of the streets, and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for ten years as to these matters of legislation If it be conceded that the power existed, as claimed, then it practically follows that, at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contract to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city.,'

The principles asserted in the case of *Canal Co.* v. *St. Louis*, 2 Dill., 84, lead to the same result.

In some of these cases there seems to have been no power given to the municipal corporations to do, through works to be created and controlled by themselves, the things for which they contracted with others. If so, the more potent is their illustration of the principle involved. The city of Brenham was not in that situation.

In the case of *City of Indianapolis* v. *Gas-Light Co.*, 66 Ind., 400, it appeared that the gas company, by its charter, was empowered to manufacture gas to be used for the express purpose of lighting the city of Indianapolis. One section of its charter declared that "said company shall have the privilege of supplying the city of Indianapolis and its inhabitants with gas, for the purpose of affording light,

for the term of twenty years." Another, "that nothing in this act shall be so construed as to grant to said Gas-Light and Coke Company the exclusive privilege of furnishing said city with gas, for the purposes within named." It was further provided that "the said city of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine-houses, market-houses, or any public places or buildings." The gas company contracted to furnish the city with gas for the period of five years from a given date, and the city refused to pay for some received during the time embraced in the contract, and to recover the price of that the action was brought. It was held that the city was liable for gas furnished after it had elected to treat the contract as a nullity, and had given notice that it would not pay for gas furnished, and for lighting, cleaning, and repairing lamps on and after a day named. The provision in the charter that the act should not be construed to give an exclusive privilege to the gas company was evidently not intended as a legislative declaration that the city might not by contract grant an exclusive privilege, but simply to avoid a misconstruction of the charter itself, and to leave the city free to make such contracts as it deemed proper, within the powers granted. The privilege given to supply the city and its inhabitants with gas for the period of 20 years, coupled with an express power to the city to contract, might well evidence an intention on the part of the legislature to permit it to contract for a longer period than was embraced in the contract made. If the legislature so willed, and there was no constitutional objection to such legislation, such a contract would be valid. From the report of the case, it is doubtful, however, whether the legislation to which we have referred controlled the decision. The gas company was chartered in 1851; the contract sued on was made July 22, 1876; and at sometime after the incorporation of the gas company, whether before or after the con-

tract was made not appearing from the opinion, the city was incorporated under a general law, one section of which gave the city power "to construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expenses of lighting any street or alley shall be paid by the owners of lots fronting thereon." The inference from the opinion is that the power of the city to make the contract was based on the power given to regulate the lighting of the streets. If so, then the decision does hold that the city had power to make the contract, extending over several years, under a grant of power of the most general kind.

This case was cited as an authority to sustain a contract for a supply of water for a city embracing a period of 20 years. *City of Valparaiso* v. *Gardner*, 7 Amer. and Eng. Corp. Cas., 629. The city of East St. Louis was given power to contract and be contracted with; to provide for lighting the streets and erection of lamp-posts; and to make such ordinances as might be necessary to carry into effect those and other powers granted. The East St. Louis Gas Company was given power by its charter to contract and be contracted with; power to manufacture and sell gas for the purpose of lighting the town of East St. Louis and territory contiguous, the town and city of that name being the same. The gas company was also given the exclusive privilege of supplying the town and contiguous territory with gas for 30 years, charges not to exceed rates of another company, and 10 per cent. added. The city contracted for gas for the period of 30 years, and, after it had received gas for sometime under the contract, it declined to receive more, holding the contract invalid for want of power to make it; whereupon an action was brought to recover the sum due under the contract for the period the city had received and not paid for gas furnished. Under this state of facts, the Supreme Court of Illinois held that the city was

liable for gas furnished before it disaffirmed the contract. The ground on which the contract was claimed to be invalid was the want of power to make a contract to bind the city for so long a period. The court did not pass on the validity of the contract, nor is there any intimation in the opinion of either of the judges that the court would have declared the contract binding on the city; while in an elaborate opinion by one of the judges it was held that the contract was void, and that it was beyond the power of the legislature to authorize it.

In *Water-Works Co.* v. *Atlantic City*, 6 Atl. Rep. 24, it was held that a contract made by a city having power, under its charter, to provide a supply of water for the city, by which it agreed to receive water from a water company so long as the company complied with its obligation, was valid. From the report of the case, we cannot ascertain fully what the charter powers of either corporation were; but, to the objection that the city had no power to bind itself for an indefinite period, the court replied that the contract provided a means by which the city could terminate it at any time.

These are the leading cases bearing on the question before us, and we are of the opinion that the better reason is with those that hold that a municipal corporation has no power, under such laws as operate on the contract before us, to make such a contract. Municipal officers hold but for short terms, those of the city of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs as near as may be in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body, the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon

such corporations. Cases will arise in which it becomes necessary to make investments for permanent improvements, and as to such things the acts of the governing body then acting must necessarily be given effect. The improvement in such cases becomes the property of the city, and its power over it continues, through which it may use, change, or so deal with it as may be deemed best.

We do not wish to be understood to hold that a municipal coporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things or any others, by which they will be, in effect, precluded from exercising from time to time any power, legislative in character, conferred upon them by law.

There is, however, another question involved in this case, which will be examined, reaching further than the one we have considered, *and involving, not only the power of the municipal corporation to make the contract sued on, under the terms of the charters of both corporations, but involving the question of the power of the legislature, directly or indirectly, to confer upon the water company such rights and privileges as it claims under the contract.* It is claimed that the contract *creates a monopoly*, and that this is in violation of the constitution, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, *it is forbidden by the constitution, and no legislation can give validity to it. A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly.* There are, however, certain classes of exclusive privileges which do not amount to monopolies, and a consideration of these, and the grounds on which they stand, is not now necessary.

The right to exercise the exclusive privilege need not extend to all places; it is enough that it is to operate in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; it is enough that it be an exclusive privilege, for a period of time, of the character forbidden. The more general is its application as to places and persons, and the longer it is to continue, the more hurtful it becomes. In the case before us, the contract, as we have seen, gives the exclusive right to sell to a community for public purposes for the period of 25 years, thus affecting all the inhabitants in their common right directly, and in their individual rights at least indirectly. This right to sell for public purposes carries with it, through the contract, the obligation to buy for public uses. It gives the exclusive right to sell to the inhabitants of the city for the same period, for all the private uses for which they may need water, in such ways, and to be so applied, as it can be only by a system of waterworks; which is a denial, in effect, to the inhabitants of the right to buy for these private purposes from any other water company. Such an exclusive right prevents competition, and tends to high prices; all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century. It has been said, in cases to which we will hereafter refer, that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. A system of water or gas works may be operated in a town or city as well by one individual as by a private corporation, if he have the ability. No corporate franchise is necessary to that purpose. It is an occupation in which any person

may engage if he has the means, which may, and ordinarily will, involve the right to use streets and other public grounds.

Thus, means to accomplish the purpose can ordinarily be acquired only through provisions given directly or indirectly by the State, but cases may arise in which no such consent would be necessary. Such a franchise, when granted, is one of the fullest character, and, from its nature, subject at all times to control.

Some conflict of authority exists as to whether such contracts as that under consideration create monopolies. The question has arisen in several cases in which gas and water companies asserted exclusive right to use streets for laying down mains and pipes, under charters granted, which, in terms, gave exclusive right. The question has most frequently arisen in cases between rival companies seeking to use streets, and in which no further right was directly involved.

In *Norwich Gas-Light Co.* vs. *Norwich City Gas Co.*, 25 Conn. 19, it appeared that the a company holding a charter which in terms gave it the exclusive right to use streets for the purpose of laying down pipes, rearing gas-posts, burners, and other things necessary to lighting the streets, alleys, lanes, public grounds, and other places, sought to restrain a rival gas company from using the streets for a like purpose; and it was held that the charter created a monopoly which the court would not sustain, even in the absence of a constitutional provision forbidding monopolies. Such a claim asserted by a gas company holding under a contract with a municipal corporation, which assumed to give the company the exclusive right to use the streets for the purposes of its business, in another case it was held to be a monopoly, and on that ground the claim held to be invalid. *State* vs. *Cincinnati Gas-Light Co.*, 18 Ohio St. 293.

The case of *City of Memphis* vs. *Memphis Water Co.*, 5 Heisk. 525, was very similar in its facts to the

Connecticut case above noticed, and it was held that the exclusive right to use the streets of the city, given to the water company by its charter, did not create a monopoly. As this case fairly presents the theory on which such exclusive grants to use streets for gas and water purposes are maintained, we will quote a part of the opinion. The court said: "The question, then, is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water-works in Memphis, to take up pavements, occupy the streets, and do such things as were necessary and proper in completing their water-works? It is clear that none had the right to do those things except the city of Memphis, by virtue of its corporate powers, and this right on the part of the city was exclusive until it was taken away by the legislature, and transferred to the Memphis Water Company. It is no more a monopoly, when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city. It is an exclusive privilege in the Memphis Water Company, but not a monopoly."

In *New Orleans Gas Co.* vs. *Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, it appeared that the plaintiff had a charter which gave it the exclusive right, for the period of 50 years, of making and supplying gas-light to the city of New Orleans by means of pipes or conduits laid in the streets, to such persons as might voluntarily choose to contract for it. The defendant was subsequently chartered under a general law authorizing the formation of corporations for certain purposes, among which was the construction and maintenance of works for supplying cities or towns with gas, and it had obtained provision from the common council of New Orleans to use its streets and other public ways and places to lay mains, pipes, and conduits. This it was proceeding to do when a suit was brought to restrain it, and it was held that the exclusive grant, in connection with

the facts shown, constituted a contract which State legislation could not impair. In disposing of the case it was said: "Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public places of New Orleans, and place their pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city, acting under legislative authority." * * *

To the same effect is the decision of the Supreme Court of Louisiana in *Crescent City Gas-Light Co.* vs. *New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas-pipes, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and in the exercise of the police power, the State could carry on the business itself, or select one of several agents to do so."

Subsequently to the granting of the charter through which the plaintiff claimed, the constitution of the State of Louisiana was so changed, while preserving rights, claims, and contracts then existing, as to provide that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are fully abrogated," and it was claimed that this could operate to divest the plaintiff's privilege. As to this the court, however, said: "The monopoly clause only evidences a purpose to reserve the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges as a means of accomplishing public objects. That

change of policy, although manifested by constitutional enactments, cannot affect contracts which, when entered into, were within the power of the State to make." The inference from the language used is that, had the constitutional provision in regard to monopoly features in charters been in force when the plaintiff's charter was granted, its exclusive privilege, franchise, or whatever it may be termed, would have been inoperative.

In *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674,[1] a suit was brought by the company to restrain Rivers from laying pipes, mains, and conduits from the Mississippi river to the St. Charles Hotel; and the claim was based on the fact that the plaintiff had a charter which gave it the exclusive right to supply the city of New Orleans and its inhabitants with water from the Mississipi river, or other stream, by mains of conduits, with such right to lay them in the streets, public places, and lands of the city, which had been granted in consideration that it would furnish water to the city free of charge. The claim of the plaintiff was sustained, and the charter held to be a contract that could not be impaired by the constitutional provision afterwards adopted, to which reference is made in the preceding case. The same inferences may, however, be drawn from the opinion, as to what would have been the effect of the provision of the constitution repealing "the monopoly features in the charter of any corporation," had it been operative at the time the plaintiff's charter was granted.

In the case of *State* v. *Milwaukee Gas Co.*, 29 Wis. 460, it was conceded that the grant of an exclusive right to lay pipes, for the purpose of conducting gas in the streets, avenues, and other public places of a city, coupled with the exclusive right to manufacture and sell gas to its inhabitants for 15 years, created a monopoly.

In the *Slaughter-House Cases*, 16 Wall., 61, 65, 102, 121, 128, it was conceded that the exclusive privilege in question, in these cases, was a monopoly;

but in these, as in the case last above cited, it was held that, in the absence of some constitutional provision forbidding monopolies, the grant of these exclusive privileges was not invalid. Under an exclusive grant of privileges, similar to those in question in the *Slaughter-House Cases*, it was held in the case of *City of Chicago* v. *Rumpff*, 45 Ill., 97, that a monopoly was created. The court said: "Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business."

In the case *of State* v. *Gas Co.*, 34 Ohio St. 581, it was held that such an exclusive right as the contract in this case gives, created a monopoly.

It will not do to say that an exclusive right in a municipal corporation to operate water or gas works stands upon the same ground as does such exclusive right held by a private corporation or an individual. In the one case the right is, in effect, exercised by the people who are to be affected by it, and not for profit, but for the welfare and convenience of the public and the inhabitants of the corporation. The correction of abuses in its management, whereby oppression may be avoided, is in the hands of the people; while, on the other had, such works are operated for privated gain, with every incentive to oppression, without power, in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly, and in the other not.

The exclusive rights given by the contract before us lead to the same results as a monopoly in any other matter; and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law, and the exercise of rights the one or the other may possess to confer, we are of the opinion that the exercise of the exclusive rights conferred on the water company produce the same results as would the exercise of an exclusive right

which would fall within the most exacting definition of a monopoly, and that the allowance or creation of such exclusive rights is contrary to the spirit of the constitution of this State.

There are many other questions in this case which, in view of the controlling character of those already considered, need not be examined.

If the appellee furnished water between the time the works were put in operation, under the ordinance passed June 1, 1885, and the tenth July of that year, when the city declined further to regard the contract as binding, for that the city ought to be held liable; but this is the extent of the right of the appellee to recover for water furnished the city.

The judgment will be reversed, and the cause remanded.

And now it seems that, upon this point, the only question remaining is: will this Court follow the construction of the above provision of the Texas constitution as given by the Supreme Court of that State in the Brenham case above quoted?

In *Fairfield* vs. *County of Gallatin*, 100 U. S. p. 52, it is said, "That at a very early day it was announced that in cases depending upon the constitution or statutes of a State, this Court would adopt the construction of the statutes when that construction has been settled by the decision of its highest tribunal. In *Walker* vs. *State Harbor Commissioners* (17 Wall. 648,) we said: "This Court, following the adjudications of the highest court of the State," in the construction of its statute, its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. (See also *Elmendorf* vs. *Taylor*, 10 Wheat., 152; *Green* vs. *Neals Lessee*, 6 Pet., 291; *Leffingwell* vs. *Warren*, 2 Black.,

599; *Sumner* vs. *Hicks*, Id., 532; *Olcott*, vs. *The Supervisors*, 16 Wall. 678; *State* vs. *Railroad Tax Cases*, 92 U. S., 575.) Such has been our general rule of decision. Undoubtedly some exception should have to be recognized. One of them is that when the highest Court of a State has given different constructions to its constitution and laws, at different times, and rights have been acquired under the former constructions, we have followed that and disregarded the latter. The present case is not within the exception, for there have been no conflicting interpretations by the State Court of the section of this constitution we are called upon to construe" (Ib. p. 52). And it has been held that this Court will abandon its former decision, construing a State statute, if the State Courts have subsequently given to it a different construction." (Ib. p. 54).

In the case of *Louisiana* vs. *Pillsbury*, 105 U. S., p. 294, in speaking of the construction of the constitution of Louisiana by the Supreme Court of that State, this Court said :

"The exposition given by the highest tribunal of the State *must be taken as correct, so far as contracts made under the act are concerned.* This doctrine applies as well to the constuction of a provision of the organic law as to the construction of a statute. The construction so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that, when a statute of two States, expressed in the same terms is construed differently by the highest Court, they are treated by us as different laws, each embodying the particular construction of its own State, and en-

forced in all cases arising under it." Citing *Christy* vs. *Pridgeon*, 4 Wall. 196, and *Shelby* vs. *Guy*, 11 Wheat, 361. In the case of *Post* vs. *Supervisors* and *Amoskeag Bank* vs. *Ottowa*, 105 U. S., p. 669, the court said: "The construction uniformly given to the construction of a State by its highest Court is binding on the Court, of the United States as a rule of decision;" and the same doctrine is announced in *Gormerly* vs. *Clark*, 134 U. S., p. 338, and numerous other decisions of this Court.

In the case of the *Louisville Gas Company* vs. *Citizens Gas Company*, 115 U. S., p. 638, which case is mainly relied on by the appellant Water Company, the Court in that case, in substance, said that "A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance by the grantee is no infringement of the clause in the Bill of Rights of Kentucky, which declares, "That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services;" but by comparison it will be seen that the Kentucky Constitution does not contain Sec. 25 of Art. 1 of the Texas Constitution of 1876, which provides: "That perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

And, in conclusion, we say that the contract of the El Paso Water Company, being inhibited by law, Equity can not and will not lend its aid to the en-

forcement of an illegal contract, or, in other words, the party must have a legal right before he can invoke an equitable remedy.

The City Council having canvassed the vote and declared the result of the bond elections, its action is conclusive against all collateral attack—*City of Fort Worth* vs. *Davis*, 57 Tex., 225, and *Dwyer* vs. *Hachworth*, Ib., 245.

The pendency of this appeal practically restrains the appellee from the negotiation of its bonds.

We respectfully submit that this case ought to be affirmed.

WALTER D. DAVIDGE
and LEIGH CLARK,
Solicitor for the City of El Paso, Appellee.

THE EL PASO WATER CO., *Appellant*,
vs.
THE CITY OF EL PASO, *Appellee.*
} No. 1385.

To Counsel for Appellant:

Take notice of the foregoing or copies of motion to dismiss or affirm, and the brief in support of said motion, which motion will be made and brief submitted on Monday, the 8th day of December, 1890, upon the meeting of the court on that day, or as soon thereafter as counsel can be heard, when and where you are at liberty to be present.

WALTER D. DAVIDGE,
LEIGH CLARK,
For Motion.

Office Supreme Court U. S.
FILED,
DEC 3 1890
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EL PASO WATER COMPANY,
APPELLANT,
vs.
THE CITY OF EL PASO,
APPELLEE.
} *No. 1385.*

APPELLANT'S STATEMENT AND BRIEF ON MOTION TO DISMISS AND AFFIRM.

WILLIAM M. THOMPSON and
MAURICE McKEAG,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EL PASO WATER COMPANY,
APPELLANT,
vs.
THE CITY OF EL PASO,
APPELLEE.
No. 1385.

APPELLANT'S STATEMENT ON MOTION TO DISMISS AND AFFIRM.

The relief sought by appellant is not for money, hence it did not require the value of the thing demanded to be stated in the prayer for a decree.

The value of the real matter in dispute however is apparent from the entire record.

The relief sought is the restraining and the enjoining of the appellee to prevent it from violating its contract, which it threatens to do, and which if violated, would damage appellant in an amount exceeding the sum of $5,000.

The appellant has acquired the rights and privileges of this contract, the value of which exceeds the sum of $5,000, by mesne assignments and transfers, which assignments and transfers have been assented to and recognized by the appellee.

It is impossible to fully understand the contract and the damages which would be suffered by the appellant were it violated by the appellee and the certainty of its violation by the appellee unless restrained by this Court without an inspection of the entire record.

Appellant understands that if the Court is satisfied upon an inspection of the record that the value of the right to be protected exceeds the sum of $5,000, that the motion to dismiss will be overruled and the motion to affirm will not be passed upon until the final hearing of the case on its merits.

With this view in mind the appellant desires to call the Court's attention to the following parts of the record (Rec. 1, 2, 3, 4):

" * * * and thereupon your orator complains and says that, under and by virtue of the said act of the Legislature of Texas and the general laws of said State,
2 the city council of said city acquired the power to provide said city and the inhabitants thereof with water, and for that purpose to contract with any water corporation for the supplying with water its streets, alleys, lots, squares and public places; that under and by virtue of an ordinance passed by the city council of said city on the 7th day of May, A. D. 1881, the said council granted to the El Paso Water Company, a private corporation then existing in said city, *the sole and exclusive right, warrant, and authority for the period of fifteen years to manufacture, sell and furnish water to the inhabitants of the city of El Paso, to both public and private buildings and for irrigation, within the corporate limits of said city, and the sole and exclusive right, war-*

rant and authority for said period to lay pipes, 'mains and conductors underneath the streets, alleys, lanes and squares in said city for the purpose of conducting water;' that thereafter, to wit, on the 29th day of April, A. D. 1882, the said last-mentioned company bargained, transferred and assigned all of the rights, powers, privileges and franchises conferred upon it, as well by its charter as by the aforesaid ordinance, to Sylvester Watts, who in turn, bargained, transferred and assigned the same to your orator; and that by an ordinance passed on the 29th day of April, A. D. 1882, entitled, 'An ordinance supplemental to an ordinance entitled an ordinance granting certain privileges to the El Paso Water Company,' passed May 7th, 1881, the aforesaid city council in all respects ratified and confirmed said bargain, transfer and assignment made by said company to said Watts and all the acts and proceedings of said company in connection therewith or in relation thereto, and that by said last-mentioned supplemental ordinance the said city council did contract and agree to rent and did in fact rent from the said company and its successors or assigns, for and during the period of fifteen years from the 1st day of September, A. D. 1882, twenty-five fire-hydrants, to be located along the line of mains of said company, and did further agree to pay an annual rental of one hundred dollars for each of said hydrants for said period,
3 and in addition to pay to said company, its successors or assigns, for each hydrant constructed or located in excess of said twenty-five hydrants the sum of eighty dollars per annum.

"Your orator further shows that, having incorporated and organized under the laws of the State of Texas after the aforesaid sale and transfer to said Watts, and having after incorporating and organizing received from said Watts an assignment of all the rights, privileges, powers and franchises acquired by him under the aforesaid sale to him by said company and the said ordinances of said city council, it proceeded at once to lay pipes and mains in said city and under the streets, alleys, lanes and public squares

thereof; to construct large and expensive reservoirs and pumping stations within the limits of said city; to place engine and pumps therein, and generally to establish, locate and operate within the limits of said city an elaborate and costly plant, including every appliance and fixture made necessary to carry out its contract with said city to supply water to said city and its inhabitants; that in thus carrying out its said contract it had expended a large sum of money, to wit, the sum of one hundred and fifty thousand dollars, and now owns in said city property as above described, of the reasonable value of said sum of money, and that since about the 1st day of September, A. D. 1882, it has by means of its plant aforesaid continuously supplied and is still supplying said city and its inhabitants with water for all domestic and other purposes.

"Your orator further shows that not only did it originally acquire from said city by contract as aforesaid the said sole and exclusive right, warrant and authority, but such contract has in divers ways and by divers acts been subsequently aquiesced in, acted on, and ratified by the council and other authorities of said city until the 24th day of August, A. D. 1889, on which last-named date, by an ordinance then passed, the city council of said city, composed of the councilmen and mayor aforesaid, authorized and ordered the issuance (subject to a vote of the majority of the 4 *ad valorem* tax-payers of said city) of twenty-five thousand dollars in El Paso city coupon bonds of the denomination of one thousand dollars each, to be known and styled on their face as El Paso city water-works bonds, and by such ordinance declared that the proceeds of the sale of said bonds should be used for the purpose of sinking artesian wells and providing water works for said city, and that said ordinance further provides that when said bonds are prepared, signed and registered, the mayor and finance committee of the city council shall be empowered to negotiate and sell the same at not less than their par value.

"Your orator further shows that said last-mentioned ordi-

nance authorizes the levy of a special tax on real and personal property within said city sufficient to pay the interest on said bonds and to create a sinking fund for the redemption of the same; that at an election held in said city for the purpose of determining whether or not said bonds should be issued, a majority of the *ad valorem* tax-payers of said city voted in favor of their issuance; that thereafter, after ascertaining and declaring the result of said election, the mayor of said city advertised for bids for said bonds, and on the — day of October, A. D. 1889, the city council of said city accepted the bid and agreed and determined to sell said bonds to them, and that by public ordinances and acts as hereinbefore set forth, as well as by many open, public and notorious acts and declarations of the authorities of said city, it is made manifest that the said city council, in disregard and violation of the aforesaid contract with your orator, and of the said ordinances granting to it its aforesaid exclusive privileges, has wrongfully and unlawfully determined to and will (unless restrained) establish and operate water works within the limits of said city and undertake for and in behalf of said city to furnish water to said city and its inhabitants for all public and private purposes.

"Your orator further shows that if the declared purpose of said city council is carried out as above set forth it will render valueless both the property aforesaid of your orator, as well as its rights, privileges and franchises as conferred by the said contract and ordinances, and your orator will sustain thereby great and irreparable injury.

"Wherefore your orator prays that process issue to said mayor and councilmen, and upon final hearing that they and said city be enjoined and perpetually restrained from establishing, maintaining or operating any water works within the limits of said city until said period of fifteen years shall expire, and from selling and negotiating any bonds or other securities for that purpose. Your orator prays for all general relief" (Rec. 11, 12, 13).

12 * * * "and here your orator would further show that at the time of the creation and organization of said corporation, as well as at the time of the passage of said ordinance of May 7th, A. D. 1881, and at the time of the transfer by said company to Sylvester Watts and by said Watts to your orator, as hereinafter and by said original bill set forth, the said city was a small and comparatively unimportant municipal corporation, limited in resources and population and just beginning a new growth under the stimulus afforded by the recent construction of several lines of railway to her limits; that the said city, as well as the citizens thereof, were at said dates destitute of the requisite means to establish water works or other facilities necessary to supply said city and the inhabitants thereof with water, and the said persons so organizing and composing said company, with full knowledge of such facts and for the purposes and with the intent aforesaid, went before the said city council and obtained from them the passage of the said ordinance of May 7th, 1881, granting the exclusive privileges aforesaid, at the same time proposing to furnish the public buildings in said city with water at cost, which benefit was secured to said city by said ordinance; that at the time of the passage of said ordinance, as well as the time of the transfer and assignment by the El Paso Water Company to Sylvester Watts and at the time of the transfer and assignment by said Watts to your orator, as specified in said original bill, it was well understood and known by both said parties composing said company and said city council, and is here charged as a fact, that because of the want of means, both of said city and its citizens, a system of water works necessary to furnish said supply of water could only be established and built up by outside or non-resident capitalists, and that such capitalists could only be induced to invest their means in such enterprise by granting to them for a series of years such exclusive privileges and rights as are granted by said ordinance; and your orator here charges that such ordinance was passed and said exclusive privileges granted and held out by said council for the sole and

avowed purpose of inducing such non-resident capitalists to engage and invest their means in said enterprise.

"And here your orator would further show that at the time of the adoption of said ordinance, as well as at the time of the assignment by the said company to Sylvester Watts and at the time of the assignment of said Watts to your orator as aforesaid, it was well known to said corporators and said council and the citizens of said city generally, and is here charged as a fact, that on account of the small size of said city, the paucity of her population, and her limited means capitalists investing money in such enterprise could not hope for a number of years to realize any income whatever from such investment, but that in consequence of the future growth in the population and resources of said city, of which many things then gave promise, capitalists so investing, if granted an exclusive right as aforesaid, might reasonably hope within a few years to begin to derive an income from such investment, and before the expiration of the period limited for the duration of their exclusive privileges might not only make up for the loss of income in the first few years of such period, but make in the aggregate a fair profit on their invested capital; and here your orator shows that for the first three years since the establishment of its said system of water works it derived no available income from its investment, but that all income derived from the operation of such system, which was in fact small and unimportant, was during said three years reinvested in said city in necessarily adding to said system so as to enable your orator to carry out its contract with said city.

"And your orator, further amending, shows that at the the time of the passage of said ordinance the Rio Grande river, which runs by and constitutes in part the western boundary of said city, was and still is the only source from which a supply of water adequate for said city and its inhabitants could be drawn; that to obtain such supply
13 from said river and properly distribute it throughout said city it was and still is necessary to elevate water

from the bed or channel of said river to a height of two hundred feet, and at such elevation to collect it in reservoirs for the purpose of ridding it of silt by settling and distributing it to said city and its inhabitants aforesaid; that by reason of such facts the cost of furnishing said city and its inhabitants with water was and has continued to be usually great, requiring the use of expensive machinery and an enormous outlay for fuel and other necessary purposes; that at said time said city was and has continued to be remote from market where machinery and material and the necessary fixtures and appliances could alone be obtained, which were and are indispensable in establishing, maintaining, and carrying on a system of water works, and that in addition to all of these facts the cost of labor and other necessary incidental expenses connected with the operation of said system in said city were and have continued to be unusually, even extraordinarily, great.

"And your orator, further amending, shows that because of all the facts hereinbefore recited and set forth, which were well known to and fully discussed and understood by the said corporators and the citizens and authorities of said city, the said city council of said city could not at the passage of said ordinance nor at any time since until quite recently, as hereinafter shown, have provided said city and inhabitants with water by means of any system of water works or other facilities and appliances adequate to that end, nor was it practicable or possible for said council to obtain such water supply and thus carry out and exercise the power conferred on it by said first-mentioned special act in any other manner than by contract with non-resident capitalists, granting and guaranteeing to said capitalists special exclusive rights and privileges for a series of years, as was done by said ordinance of May 7th, 1881, and other ordinances supplemental thereto and amendatory thereof, as set forth in said original bill.

"And your orator would here further show that it is a private corporation, composed entirely of non-residents of the State of Texas, and that all of its original investment

in its said water works in said city was made entirely with capital drawn from beyond the limits of said State; that it was knowingly induced by said city council to engage in the enterprise of establishing such works and furnishing said city and inhabitants with water, as in said original bill and hereinafter set forth, by the grant of said exclusive rights and privileges, and that it would not (as was well known to said council) have engaged in such enterprise and invested its capital therein but in consideration of such exclusive rights and privileges so granted as aforesaid and the consequent exemption from competition after by the growth in wealth and population of said city its investment should begin to yield a fair return or income" (Rec. 14, 15).

* * * "Your orator, further amending, shows that after succeeding to aforesaid rights, powers, privileges and franchises it at once proceeded to and did in fact establish a complete system of water works within the corporate limits of said city, adequate in every respect for the supplying of said city and its inhabitants with water for all purposes, both public and private, at a cost of more
14 than seventy thousand dollars ($70,000), and since establishing such works your orator has from time to time enlarged, extended, and added to the same at great cost and expense in order to maintain in said system a capacity for storing and distributing water commensurate with the growth of said city in size, population, and wealth, expending in so doing the further sum of about eighty thousand dollars ($80,000), so that at this time the said system is amply sufficient for the furnishing of said city and its inhabitants with water, and by means of the same, as established, enlarged, extended, and added to as aforesaid, your orator, since about the first day of September, A. D. 1882, has been and still is faithfully carrying out its contract with said city in supplying said city and its inhabitants with water for all public and private purposes, and has fully prepared to and will (if permitted so to do) continue to provide such supply of water for the whole of said period of fifteen years, which period your orator avers was reasonable,

proper, and necessary under all the circumstances in granting and limiting its aforesaid exclusive rights and privileges.

"And your orator, further amending, shows that by an ordinance duly passed and adopted by said city council on the 24th day of December, A. D. 1883, entitled an ordinance amending sections one, two, three, four, five, and adding section six to an ordinance supplemental to an ordinance entitled 'An ordinance granting certain privileges to the El Paso Water Company, passed May the 7th, 1881,' which said supplemental ordinance was passed April 29th, 1882, it was provided and enacted as follows, to wit:

"First. That the city of El Paso agree to and did rent 'from the El Paso Water Company, meaning the company first hereinbefore mentioned, and its successors and assigns, for and during the term of fifteen years from the first day of September, A. D. 1882, twenty-five hydrants (25), to be located by said company as directed by the city council of said city, and to be erected at the expense of said company or its successors or assigns.

"'Second. That said council agreed to pay an annual rental for each of said twenty-five hydrants of one hundred dollars, and for each hydrant constructed or erected as directed by said council in excess of said twenty-five hydrants and to and including fifty hydrants, the sum of sixty dollars per annum, and for each hydrant erected and located as directed by said city council in addition to and over and above said fifty hydrants, the sum of forty dollars per annum, the rental for all of said hydrants to be paid in quarterly installments.

"'Third. That said company or its successors or assigns, from and after the 1st day of January, A. D. 1884, should not charge any of the inhabitants of said city a sum exceeding four cents per barrel of forty gallons until such times as said city should have a population of eight thousand, after which time and until such time as said city should have a population of twelve thousand a sum not exceeding three cents per barrel of forty gallons should be charged for water.

"'Fourth. That for sprinkling purposes water should be taken by said city or any persons engaged in sprinkling the streets, alleys or public grounds with carts or wagons at a cost not to exceed two cents per barrel of forty gallons, and by any of the inhabitants of said city for private sprinkling at a cost not to exceed three cents per barrel of forty gallons.

"'Fifth. That approved meters should be furnished, attached and placed wherever and whenever necessary on said works at the cost of said company, meaning your orator.

"'Sixth. That in the maintenance of said water works, meaning the system established by your orator, a pressure of at least one hundred and fifty feet should be provided and maintained.

"'Seventh. That said El Paso Water Company, meaning your orator, should give a written guarantee to the city of El Paso that only clear, healthy water should be delivered to any of the inhabitants of said city for private uses under a penalty of free service for such time as the water delivered should be muddy and impure, and that said water company, meaning your orator, should further file its written acceptance of said ordinance of April the 29th, 1882, as amended by said ordinance of December 24th, 1883, and that said guaranty and acceptance should be spread on the minutes of said council and filed in the office of the city clerk of said city, to be and remain there as an archive. * * * * * * (Rec. 16, 17.)

"'And your orator, further amending, shows that prior to the passage of said ordinance of December 24th, 1883, your orator, acting under the direction of said city council of said city, erected at its own expense twenty-five (25) fire-hydrants, which were located from time to time at points designated by said city council along the lines of mains of your orator's said system of water works, and thereafter, as instructed from time to time by said council, has located and erected sixteen (16) additional fire-hydrants at its own cost and expense; that under and by virtue of its contract with said

city, as evidenced by the several ordinances hereinbefore mentioned, the validity of which contract has been constantly recognized by said city and its authorities until recently, as hereinafter set forth, your orator is justly and legally entitled to receive from said city for and during the remainder of said period of fifteen years, which period began on September 1st, 1882, the sum of one hundred dollars ($100) per annum for each of said twenty-five (25) hydrants first above mentioned, and the sum of sixty dollars ($60) per annum for each of said additional sixteen (16) hydrants, making in the aggregate the sum of three thousand four hundred and sixty dollars ($3,460) which said city is bound and liable under said contract to pay to your orator for each and every year of the unexpired portion of said period; and, further, that said city under said contract is legally bound to rent from your orator for and during the unexpired portion of said period any additional hydrants over and above those already located as aforesaid which may hereafter be required in said city and to pay to your orator for each additional hydrant, which do not increase the total number of hydrants above the aggregate of fifty, the sum annually of sixty dollars ($60), and for each above said aggregate the annual rental sum of forty dollars ($40); and your orator here shows that by ordinance of April 29th, 1882, supplemental to that of May 7th, 1881, the said city agreed to and did rent from your orator during said period of fifteen years, commencing September 1, 1882, twenty-five hydrants (25) for fire purposes, to be located as directed by said council, and agreed to pay your orator for each of the same an annual rental of one hundred dollars ($100), and further agreed to pay your orator annually the further sum of eighty dollars for each hydrant so constructed and erected in excess of said twenty-five hydrants; and your orator further shows that by said ordinance of December 24th, 1883, and your orator's acceptance of the provisions thereof, the city obtained an abatement of the rental price of all hydrants in excess of twenty-five (25) from eighty dollars ($80) each to sixty dollars ($60) and forty ($40) respectively, as above shown.'"

From the quotations of matters and facts appearing in the record, it will be observed that the appellant has invested in the construction of water works in El Paso the sum of $150,000.00 in complying with its parts of the contract; that this amount and investment, as well as its rights, privileges and franchise as conferred by said contract, *will be rendered valueless* if the declared purpose of the appellee is carried out.

It also appears from the record, on pages 3 and 23, that the amount of the bonds threatened to be issued and which are sought to be enjoined, is $100,000.00. It also appears that under the contract the appellee is liable to the appellant for hydrants contracted for, the sum of $3,460 per annum for an unexpired term of more than five years, or a sum equal to $17,300.00. In addition to all that appears in the record, lest a doubt should still exist in the Court's mind, the affidavits of Sylvester Watts and William H. Watts are offered to the Court, both of which with reference to the loss and damage which the appellant is likely to suffer if the appellee violates its contract, as threatened, would be at least thirty thousand dollars.

[COPY of affidavits on file of WILLIAM H. WATTS and SYLVESTER WATTS.]

No. 1385.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF TEXAS.

William H. Watts, of lawful age, being duly sworn by me, did solemnly swear:

1st, That he is now and has been ever since the month of October, 1882, Superintendent of the El Paso Water Company, doing business at El Paso, Texas, and for all that time has resided at El Paso, Texas.

2nd, That as such Superintendent he has had charge of said Water Company's works and the supplying by it with water the town of El Paso and the inhabitants with water.

3rd. That the profits derived by said Water Company from the said town of El Paso and its inhabitants for supplying it and them with water for one year ending the 22nd day April, 1890, was more than eight thousand dollars.

4th, That if the town of El Paso were to operate a water works and supply *itself and its inhabitants* with water from the said 22nd day of April, 1890, until the 7th day of May, 1896, it would be a loss and damage to the El Paso Water Company of more than forty thousand dollars.

5th, That for the year ending the 22nd day of April, 1890, the El Paso Water Company received from the town

of El Paso for supplying it with water more than four thousand dollars, and that said town of El Paso will likely require a greater quantity each year until the 7th day of May, 1896.

6th, That if the said town of El Paso were to supply *itself with* water from said 22nd day of April, to 7th day of May, 1896, the loss and damage to the said Water Company would exceed the sum of twenty thousand dollars.

WILLIAM H. WATTS.

Subscribed and sworn to before me, at El Paso, Texas, this 21st day of November, A. D. 1890.

GEO. WYTHE BAYLOR,
[SEAL] Clerk United States Court.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF MISSOURI.

EL PASO WATER COMPANY, Appellant,
vs.
THE CITY OF EL PASO, Appellee. } No. 1385.

Sylvester Watts, of lawful age, being duly sworn by me, did solemnly swear that he is now a resident of Webster Groves, St. Louis County, Missouri; that he is a hydraulic engineer and constructor of water works and gas works, and has been in said business for more than twenty years last past; that he constructed the water works at El Paso, Texas, and put them in operation on or about the 1st day of September, 1882; that he has ever since said 1st day of September, 1882, visited and examined said

water works at El Paso several times each year and is fully acquainted with the costs and value of the original plant and the additions added thereto, extending and enlarging said works, and of the profits derived from their operation.

That said water works has now a capacity to supply said city of El Paso and its inhabitants for the next six years at least; that if said city of El Paso construct and operate a water works and supply the City of El Paso and its inhabitants with water, it will be a loss of profits to the El Paso Water Company, appellant, of at least six thousand dollars per annum for the next five years following to and from the 22nd day of April, 1890.

SYLVESTER WATTS.

Subscribed and sworn to before me this 19th day of November, A. D. 1890.

A. P. SELBY,

[SEAL.] Clerk of the U. S. Circuit Court, Eastern Division, Eastern Judicial District of Missouri,

By GEORGE F. HAID,

Deputy.

Ex Parte Bradstreet, 32, U. S, 634.

BRIEF OF APPELLANT.

The appellant, confidently hoping that the Court will overrule the motion to dismiss for want of jurisdiction, it trusts that a full opportunity will be given by the Court to hear the case by argument on its merits. While the appellee may, under Rule 6, join with a motion to dismiss a motion to affirm if it be manifest that the appeal was taken for delay only. It is a matter for the Court to say, upon examination of the record, whether this is a case for the application of that rule.

Gay *vs.* Parpart, 101 U. S. 391.
Minor *et al vs.* Tillotson, 42 U. S. 287.

With more of a view to satisfy the Court that this case has not been brought to this Court by appeal for delay only than discussing the merits, the appellant respectfully submits, that there is a section in the Constitution of Texas, 1876, not cited by the appellee—that is Section 3 of Article II. (Con. of Texas, Art. II., Sec. 3, page 1, R. S. Texas, 1879.)

This Section 3 recognizes the power to give *exclusive privileges*, and declares that such privileges shall only be given "in consideration of public services," thus necessarily implying that there are certain exclusive privileges which are not monopolies, and which never were intended to fall within the inhibition of Section 26 of the same article of the Constitution of Texas.

The decision of the Supreme Court of Texas in the case of The City of Brenham *vs.* The Brenham Water Company,

only passes upon Section 26 of Article II. of Constitution of Texas, and not on Section 3.

Upon examination of the record in the case at bar, numerous public *services* were to be performed under its exclusive contract, and has been performed by appellant to the town of El Paso and its inhabitants, namely, the supplying the city with hydrants at a fixed price, and the giving of water free; in other instances, the supplying the inhabitants at a fixed price, and under certain limitations and restrictions, etc. Moreover, there are exceptions to this Court's rule of following the construction given by the Supreme Court of a State to its Statutes and Constitution, and one of these are when the construction given by the State Supreme Court would lead to the violation of a contract fairly made upon adequate consideration.

This Court has expressly held that such an exclusive privilege upon condition of service by the grantee after performance by the grantee, is a contract, protected by the Constitution of the United States.

> Louisville Gas Company *vs.* Citizens' Gas Company, U. S. Rep. 115, page 683.
> New Orleans Gas Company *vs.* Louisiana Light Company, U. S. Rep. 115, page 650. Also p. 674.

According to the statements of the bill, which are admitted to be true, there was, we respectfully submit, a contract, and the only excuse for the proposed breach of it is that the city is not bound by it, because it claims it is *ultra vires*. The consideration then resolves itself into whether or not the ordinance passed by the City Council of El Paso, on the 7th day of May, 1881, to the El Paso Water Company, granting to it the sole and exclusive right, warrant and authority for the period of fifteen years,

to manufacture, sell and furnish water to the inhabitants of the city of El Paso, to both public and private buildings, and for irrigation within the corporate limits of said city, and to lay pipes, mains and conductors under the streets, alleys, lanes and squares in said city, for the purpose of conducting water, was it accepted and a large expenditure made to furnish said city and inhabitants by the appellant was a contract?

Furthermore, was such a contract authorized by the *special charter* granted by the legislative act of May 17th, 1873, and the general laws in force when the contract was made? and if so, should it not be protected by a court of equity? If the grant was within the charter powers of the town authorities, the attempt of these authorities to establish another system of water works is an open repudiation and an effort towards the violation of a contract, which is protected by the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contract.

This inhibition necessarily not only includes State legislatures, but every subordinate governmental agency, including city councils.

Upon examination of the special act of the Legislature of the State of Texas it will be observed that it grants to the city of El Paso, other and greater powers than is generally given municipal corporations created by general laws relative to the contracting for supplying cities with water. Companies existing under the general laws in force at the time. See General Laws of Texas, 1870, Art. 5993. Its charter empowers the city of El Paso to do, within its limits, and in fact beyond these, all that is necessary to provide the city with water and do all that a water

company could do organized as a private company under Art. 5993 of General Laws.

This power was not a governmental one, to be exercised as an agent of the State for State purposes, but merely for the benefit of said city of El Paso and its inhabitants, and solely and exclusively for them.

Referring to the city charter, it will be seen. that the city of El Paso was incorporated under a special act of the State of Texas, approved May 17th, 1873. Special Laws of 1873, page 638. By section 1 of this act the inhabitants within a described limit were constituted a body politic, and under the name of "El Paso," among other powers, had the right to sell and convey personal estate and make such order respecting the same as may be conducive to the interest of the city *and make all contracts* and *do all other acts in relation to the property and concerns of the city, necessary*, to the exercise of its *corporate* or *administrative* powers.

By section 3 of said act these powers were to be exercised by the mayor and city council.

These were to dispense and direct the application of these powers both governmental (pertaining to the municipality) and administrative (pertaining to the proprietary) and pecuniary interest of the city and its inhabitants.

By section 25 of said act these were authorized, "To provide the city with water, to make, regulate and establish public wells, pumps, cisterns, fountains, hydrants, reservoirs in the street or elsewhere within the said city or beyond the limits thereof, for the extinguishment of fires and the convenience of the citizens." This is not a governmental power. By section 22 of said act the power of the city to borrow money was limited over and above the general tax not to exceed one-half of one per cent. and

the rate of interest not to exceed ten per cent., and by other limitations, so that it could not carry out the privileges granted to it to supply the city and its inhabitants with water. Under the General Laws of Texas, then in force, a private corporation could have been formed for "the supply of water to the public." Subdivision 14 of Art. 5935 Laws of Texas, but under Art. 5992 of said laws. But when a corporation was incorporated merely for this purpose it was necessary to get the consent of the municipal authorities of the city where such company proposed to operate before it could lay pipes, etc.

Under Art. 5993 the municipal authorities of any city were authorized to contract for supplying with water the streets, lots, lanes, squares and public places in such city.

By this special act of the Legislature and the General Law there was virtually granted to the city of El Paso exclusive control of matters relative to the supply of water for the city and its inhabitants, but it ascertained that the limitation to taxation prevented it from carrying out the privilege granted, and it sold, conveyed and assigned this privilege to the Water Company by mesne conveyances and contracts and its good-will in this business for fifteen years, and good faith requires that the city should do nothing which directly tends to deprive the company of its benefit and advantage for this period.

Hall's Appeal, 60 Penn. St. 458.
Saugatuck Bridge Co. *vs.* Town of Westport, 39 Conn. 337.

This is especially so when the enterprise required a large capital and individual energy to meet the rapid growth of the city where the chances of gain were no more than equal to the risk of loss. This being the status of affairs,

it is no more than just and reasonable to suppose that the Water Company would not have invested its capital without knowing whether the city intended to assume the power given it at any time or not.

The exclusive privilege is nothing but the guaranty given by the city to the Water Company that it should not engage in this business for fifteen years, and inasmuch as it contracted for that length of time, *its power is executed* and it can legally do nothing and ought not be permitted to do anything so long as the Water Company complies with its contract. This doctrine is equitably elucidated in the following case, which is a parallel case to the one at bar:

Atlantic City Water Works *vs.* Atlantic City, 12 Stewart's New Jersey Equity Reports, 39, page 367,

and cases cited in the decision.

A clear distinction is made between the powers that are governmental, and the privileges granted to a municipal body, which might be conferred on a private corporation.

An eminent Court says:

"It is the duty of the State Government to secure to the citizens of the State the peaceful enjoyment of their property and its protection from wrongful and violent acts."

For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations, to be exercised for the benefit of the individuals of whom such corporations are composed; and in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there are distinctions between those powers delegated to municipal corporations, to preserve the peace and protect persons

and property, whether to be exercised by legislation or the appointment of proper officers; and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation and its adaptation to the purposes of residence or business.

As to the first the municipal corporation represents the State, discharges duties incumbent on the State; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable.

Western College, etc. *vs.* City of Cleveland, 12 Ohio, 375.

"A municipal corporation is created mainly for the interest, advantage and convenience of the locality and its people."

"In the case of municipal corporations proper, the electors are mediately invested with very ample control over their agents, not only as to what shall be done, but how it shall be done, and by whom it shall be done; they may exact such guarantee as they deem proper for their government."

"Where an act is done to the injury of another by a natural person in pursuit of his own interests, or through its agents by an artificial person or corporation proper which is called into existence, either at the direct solicitation or by the free consent of the persons composing it, for the promotion of their own local and private advantage and convenience, and which can work only through agents, such natural or artificial person is on every principle of justice and enlightened reason bound to rectify the consequence of his own misfeasance."

Commrs. of Hamilton Co. *vs.* Mighels, 7 Ohio St. 109.

"The Master of Rolls, in speaking of the *East India*

Company, admitted that it had *rights* as a *sovereign power*, but declared that it had also *duties* as an *individual*, and notwithstanding its claim to the right of violating its contracts as an incident to its character as a sovereign power, it was held to be bound to its contracts as a private company."

Moodlay *vs.* Morton, 1. Brown's Ch. Rep. 471.

The restriction upon the power of a municipal corporation to enter into contracts which may prevent it from performing its duty to the public, is nothing more than the application of the principle which avoids the contracts of individuals when they are detrimental to the public rights. But the contract which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses relate to "the things of commerce," as distinguished in the civil law from the "things public," which are regulated by the sovereign. Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation.

The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for private emolument and advantage of the city as for the public good. The whole investment is the private property of the city as much as the lands and houses belonging to it: "* * * * It stands upon the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." (Citing Bailey *vs.* The City of New York, 3 Hill, 538.)

In this case it also cites Green *vs.* Biddle, 8 Wheat. 84: "The objection to a law on the ground of its impairing the obligations of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms * * * however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligations."

Western Saving Fund Society *vs.* The City of Philadelphia, 31 Penn. St. Rep. 175.

With regard to the illegality of the bonds it is apparent from the facts stated in the bill and admitted by the demurrer thereto that bonds of the face value of $100,000 are about to be issued by the appellee, for the payment of which and the interest thereon this appellant will be illegally taxed by it.

The appellant has a common undivided interest (with others it is true, but these are so numerous that it would be impracticable to name them all in the bill and have them join) in preventing the issuance of these bonds for the payment of which the appellant and these are to be illegally taxed, the several amounts of which at present are unascertainable. The appellant respectfully submits that under these circumstances the matter in dispute is the amount of the bonds.

Davies *vs.* Corbin, 112, U. S. 37.
Shields *vs.* Thomas, 58, U. S. 3
Market Company *vs.* Hoffman, 101, U. S. 112.

WILLIAM M. THOMPSON and
MAURICE McKEAG,
Counsel for Appellant.

Office Supreme Court U. S.
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CLERK.

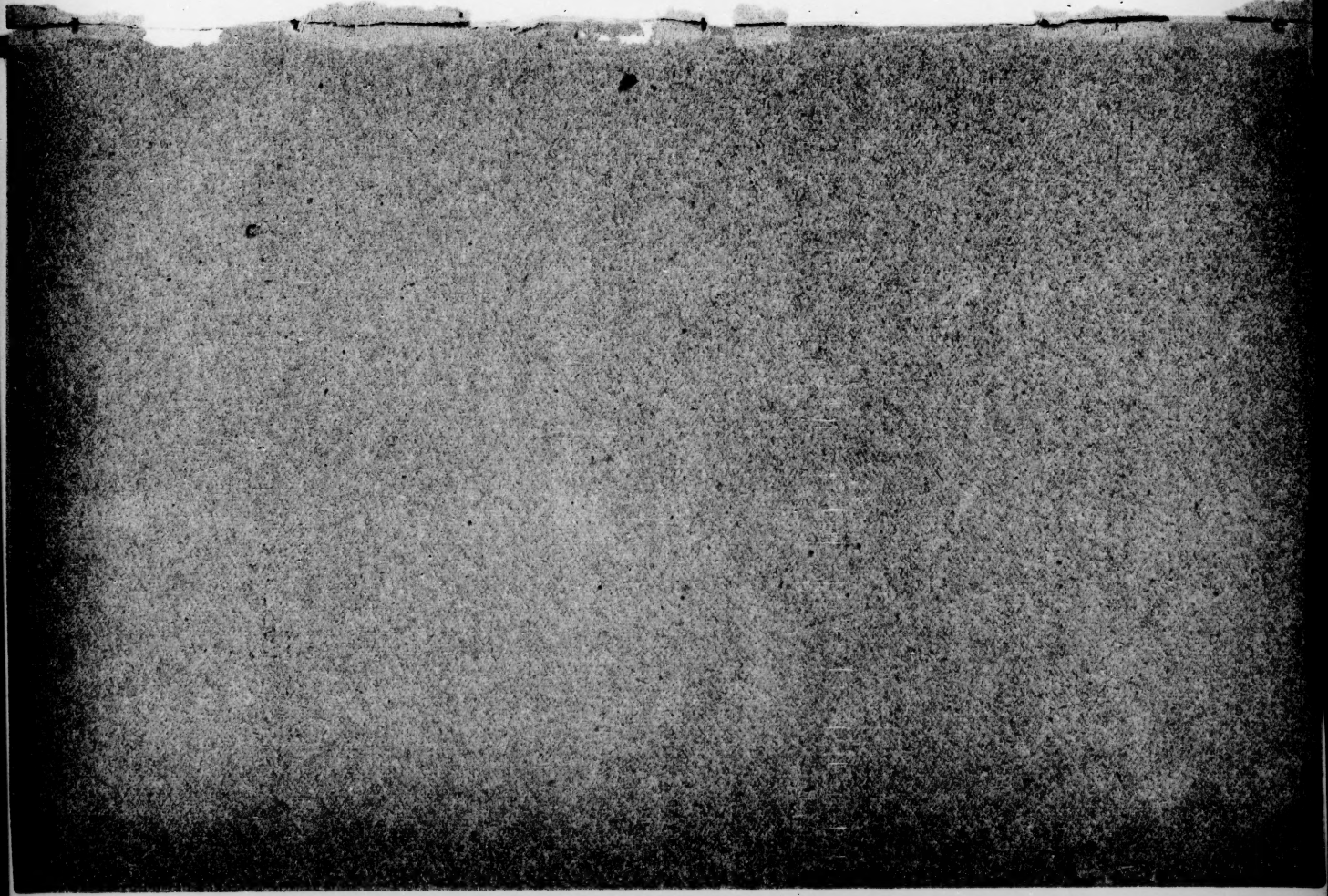
In the Supreme Court of the United States.

OCTOBER TERM, 1893.

EL PASO WATER COMPANY,
APPELLANT,
vs.
THE CITY OF EL PASO,
APPELLEE.
No. 238.

APPELLANT'S STATEMENT AND BRIEF ON MOTION TO DISMISS AND ON THE MERITS.

MAURICE McKEAG,
Counsel for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1893.

EL PASO WATER COMPANY,
APPELLANT,
vs. *No. 238.*
THE CITY OF EL PASO,
APPELLEE.

APPELLANT'S STATEMENT ON MOTION TO DISMISS AND MERITS OF THE CASE.

The relief sought by appellant is not for money, hence it did not require the value of the thing demanded to be stated in the prayer for a decree.

The value of the real matter in dispute, is apparent from the entire record.

The relief sought is the restraining and the enjoining of the appellee to prevent it from violating its contract, which it threatens to do, and which if violated, would damage appellant in an amount exceeding the sum of $5,000,

The appellant has acquired the rights and privileges of this contract, the value of which exceeds the sum of $5,000, by mesne assignments and transfers, which assignments and transfers have been assented to and recognized by the appellee.

It is impossible to fully understand the contract and the damages which would be suffered by the appellant, were it violated by the appellee, and the certainty of its violation by the appellee unless restrained by this Court is apparent by an inspection of the record.

Appellant understands that if the Court is satisfied upon an inspection of the record that the value of the right to be protected exceeds the sum of $5,000, that the motion to dismiss will be overruled and the case will be heard on its merits.

With this view in mind, the appellant desires to call the Court's attention to the following parts of the record (Rec. 1, 2, 3, 4):

" * * * and thereupon your orator complains and says that, under and by virtue of the said act of the Legislature of Texas and the general laws of said State,
2 the City Council of said city acquired the power to provide said city and the inhabitants thereof with water, and for that purpose to contract with any water corporation for the supplying with water its streets, alleys, lots, squares and public places; that under and by virtue of an ordinance passed by the City Council of said city on the 7th day of May, A. D., 1881, the said Council granted to the El Paso Water Company, a private corporation then existing in said city, *the sole and exclusive right, warrant and authority, for the period of fifteen years, to manufacture, sell and furnish water to the inhabitants of the city of El Paso, to both public and private buildings, and for irrigation, within the corporate limits of said city, and the sole and exclusive right, warrant and authority for said period to lay pipes, mains and con-*

ductors underneath the streets, alleys, lanes and squares in said city for the purpose of conducting water;' that thereafter, to wit, on the 29th day of April, A. D. 1882, the said last-mentioned company bargained, transferred and assigned all of the rights, powers, privileges and franchises conferred upon it, as well by its charter as by the aforesaid ordinance, to Sylvester Watts, who in turn, bargained, transferred and assigned the same to your orator; and that by an ordinance passed on the 29th day of April, A. D. 1882, entitled, 'An ordinance supplemental to an ordinance entitled an ordinance granting certain privileges to the El Paso Water Company,' passed May 7th, 1881, the aforesaid city council in all respects ratified and confirmed said bargain, transfer and assignment made by said company to said Watts and all the acts and proceedings of said company in connection therewith or in relation thereto, and that by said last-mentioned supplemental ordinance the said city council did contract and agree to rent and did in fact rent from the said company and its successors or assigns, for and during the period of fifteen years from the 1st day of September, A. D. 1882, twenty-five fire-hydrants, to be located along the line of mains of said company, and did further agree to pay an annual rental of one hundred dollars for each of said hydrants for said period,
3 and in addition to pay to said company, its successors or assigns, for each hydrant constructed or located in excess of said twenty-five hydrants the sum of eighty dollars per annum.

"Your orator further shows that, having incorporated and organized under the laws of the State of Texas after the aforesaid sale and transfer to said Watts, and having after incorporating and organizing received from said Watts an assignment of all the rights, privileges, powers and franchises acquired by him under the aforesaid sale to him by said company and the said ordinances of said city council, it proceeded at once to lay pipes and mains in said city and under the streets, alleys, lanes and public squares thereof; to construct large and expensive reservoirs and

pumping stations within the limits of said city; to place engine and pumps therein, and generally to establish, locate and operate within the limits of said city an elaborate and costly plant, including every appliance and fixture made necessary to carry out its contract with said city to supply water to said city and its inhabitants; that in thus carrying out its said contract it had expended a large sum of money, to wit, the sum of one hundred and fifty thousand dollars, and now owns in said city property as above described, of the reasonable value of said sum of money, and that since about the 1st day of September, A. D. 1882, it has by means of its plant aforesaid continuously supplied and is still supplying said city and its inhabitants with water for all domestic and other purposes.

"Your orator further shows that not only did it originally acquire from said city by contract as aforesaid the said sole and exclusive right, warrant and authority, but such contract has in divers ways and by divers acts been subsequently aquiesced in, acted on, and ratified by the council and other authorities of said city until the 24th day of August, A. D. 1889, on which last-named date, by an ordinance then passed, the city council of said city, composed of the councilmen and mayor aforesaid, authorized and ordered

the issuance (subject to a vote of the majority of the
4 *ad valorem* tax-payers of said city) of twenty-five thous-

and dollars in El Paso city coupon bonds of the denomination of one thousand dollars each, to be known and styled on their face as El Paso city water-works bonds, and by such ordinance declared that the proceeds of the sale of said bonds should be used for the purpose of sinking artesian wells and providing water-works for said city, and that said ordinance further provides that when said bonds are prepared, signed and registered, the mayor and finance committee of the city council shall be empowered to negotiate and sell the same at not less than their par value.

"Your orator further shows that said last-mentioned ordinance authorizes the levy of a special tax on real and per-

sonal property within said city sufficient to pay the interest on said bonds and to create a sinking fund for the redemption of the same; that at an election held in said city for the purpose of determining whether or not said bonds should be issued, a majority of the *ad valorem* tax-payers of said city voted in favor of their issuance; that thereafter, after ascertaining and declaring the result of said election, the mayor of said city advertised for bids for said bonds, and on the — day of October, A. D. 1889, the city council of said city accepted the bid and agreed and determined to sell said bonds to them, and that by public ordinances and acts as hereinbefore set forth, as well as by many open, public and notorious acts and declarations of the authorities of said city, it is made manifest that the said city council, in disregard and violation of the aforesaid contract with your orator, and of the said ordinances granting to it its aforesaid exclusive privileges, has wrongfully and unlawfully determined to and will (unless restrained) establish and operate water works within the limits of said city and undertake for and in behalf of said city to furnish water to said city and its inhabitants for all public and private purposes.

"Your orator further shows that if the declared purpose of said city council is carried out as above set forth it will render valueless both the property aforesaid of your orator, as well as its rights, privileges and franchises as conferred by the said contract and ordinances, and your orator will sustain thereby great and irreparable injury.

"Wherefore your orator prays that process issue to said mayor and councilmen, and upon final hearing that they and said city be enjoined and perpetually restrained from establishing, maintaining or operating any water works within the limits of said city until said period of fifteen years shall expire, and from selling and negotiating any bonds or other securities for that purpose. Your orator prays for all general relief" (Rec. 11, 12, 13).

12 * * * "and here your orator would further show that at the time of the creation and organization

of said corporation, as well as at the time of the passage of said ordinance of May 7th, A. D. 1881, and at the time of the transfer by said company to Sylvester Watts and by said Watts to your orator, as hereinafter and by said original bill set forth, the said city was a small and comparatively unimportant municipal corporation, limited in resources and population and just beginning a new growth under the stimulus afforded by the recent construction of several lines of railway to her limits; that the said city, as well as the citizens thereof, were at said dates destitute of the requisite means to establish water works or other facilities necessary to supply said city and the inhabitants thereof with water, and the said persons so organizing and composing said company, with full knowledge of such facts and for the purposes and with the intent aforesaid, went before the said city council and obtained from them the passage of the said ordinance of May 7th, 1881, granting the exclusive privileges aforesaid, at the same time proposing to furnish the public buildings in said city with water at cost, which benefit was secured to said city by said ordinance; that at the time of the passage of said ordinance, as well as the time of the transfer and assignment by the El Paso Water Company to Sylvester Watts and at the time of the transfer and assignment by said Watts to your orator, as specified in said original bill, it was well understood and known by both said parties composing said company and said city council, and is here charged as a fact, that because of the want of means, both of said city and its citizens, a system of water works necessary to furnish said supply of water could only be established and built up by outside or non-resident capitalists, and that such capitalists could only be induced to invest their means in such enterprise by granting to them for a series of years such exclusive privileges and rights as are granted by said ordinance; and your orator here charges are granted by said ordinance; and your orator here charges that such ordinance was passed and said exclusive privileges granted and held out by said council for the sole and avowed purpose of inducing such non-

resident capitalists to engage and invest their means in said enterprise.

"And here your orator would further show that at the time of the adoption of said ordinance, as well as at the time of the assignment by the said company to Sylvester Watts and at the time of the assignment of said Watts to your orator as aforesaid, it was well known to said corporators and said council and the citizens of said city generally, and is here charged as a fact, that on account of the small size of said city, the paucity of her population, and her limited means captitalists investing money in such enterprise could not hope for a number of years to realize any income whatever from such investment, but that in consequence of the future growth in the population and resources of said city, of which many things then gave promise, capitalists so investing, if granted an exclusive right as aforesaid, might reasonably hope within a few years to begin to derive an income from such investment, and before the expiration of the period limited for the duration of their exclusive prvileges might not only make up for the loss of income in the first few years of such period, but make in the aggregate a fair profit on their invested capital; and here your orator shows that for the first three years since the establishment of its said system of water works it derived no available income from its investment, but that all income derived from the operation of such system, which was in fact small and unimportant, was during said three years reinvested in said city in necessarily adding to said system so as to enable your orator to carry out its contract with said city.

"And your orator, further amending, shows that at the time of the passage of said ordinance the Rio Grande river, which runs by and constitutes in part the western boundary of said city, was and still is the only source from which a supply of water adequate for said city and its inhabitants could be drawn; that to obtain such supply
13 from said river and properly distribute it throughout said city it was and still is necessary to elevate water

from the bed or channel of said river to a height of two hundred feet, and at such elevation to collect it in reservoirs for the purpose of ridding it of silt by settling and distributing it to said city and its inhabitants aforesaid; that by reason of such facts the cost of furnishing said city and its inhabitants with water was and has continued to be usually great, requiring the use of expensive machinery and an enormous outlay for fuel and other necessary purposes; that at said time said city was and has continued to be remote from market where machinery and material and the necessary fixtures and appliances could alone be obtained, which were and are indispensable in establishing, maintaining, and carrying on a system of water works, and that in addition to all of these facts the cost of labor and other necessary incidental expenses connected with the operation of said system in said city were and have continued to be unusually, even extraordinarily, great.

"And your orator, further amending, shows that because of all the facts hereinbefore recited and set forth, which were well known to and fully discussed and understood by the said corporators and the citizens and authorities of said city, the said city council of said city could not at the passage of said ordinance nor at any time since until quite recently, as hereinafter shown, have provided said city and inhabitants with water by means of any system of water works or other facilities and appliances adequate to that end, nor was it practicable or possible for said council to obtain such water supply and thus carry out and exercise the power conferred on it by said first-mentioned special act in any other manner than by contract with non-resident capitalists, granting and guaranteeing to said capitalists special exclusive rights and privileges for a series of years, as was done by said ordinance of May 7th, 1881, and other ordinances supplemental thereto and amendatory thereof, as set forth in said original bill.

"And your orator would here further show that it is a private corporation, composed entirely of non-residents of the State of Texas, and that all of its original investment

in its said water works in said city was made entirely with capital drawn from beyond the limits of said State; that it was knowingly induced by said city council to engage in the enterprise of establishing such works and furnishing said city and inhabitants with water, as in said original bill and hereinafter set forth, by the grant of said exclusive rights and privileges, and that it would not (as was well known to said council) have engaged in such enterprise and invested its capital therein but in consideration of such exclusive rights and privileges so granted as aforesaid and the consequent exemption from competition after by the growth in wealth and population of said city its investment should begin to yield a fair return or income" (Rec. 14, 15).

* * * "Your orator, further amending, shows that after succeeding to aforesaid rights, powers, privileges and franchises, it at once proceeded to and did, in fact, establish a complete system of water works within the corporate limits of said city, adequate in every respect for the supplying of said city and its inhabitants with water for all purposes, both public and private, at a cost of more
14 than seventy thousand dollars ($70,000), and since establishing such works your orator has from time to time enlarged extended and added to the same at great cost and expense in order to maintain in said system a capacity for storing and distributing water commensurate with the growth of said city in size, population and wealth, expending in so doing the further sum of about eighty thousand dollars ($80,000), so that at this time the said system is amply sufficient for the furnishing of said city and its inhabitants with water, and by means of the same, as established, enlarged, extended and added to as aforesaid, your orator, since about the first day of September, A. D., 1882, has been and still is faithfully carrying out its contract with said city in supplying said city and its inhabitants with water for all public and private purposes, and has fully prepared to and will (if permitted so to do) continue to provide such supply of water for the whole of said period of fifteen years, which period your orator avers was reasonable,

proper, and necessary under all the circumstances in granting and limiting its aforesaid exclusive rights and privileges.

"And your orator, further amending, shows that by an ordinance duly passed and adopted by said city council on the 24th day of December, A. D., 1883, entitled an ordinance amending sections one, two, three, four, five, and adding section six to an ordinance supplemental to an ordinance entitled, 'An ordinance granting certain privileges to the El Paso Water Company, passed May the 7th, 1881,' which said supplemental ordinance was passed April 29th, 1882, it was provided and enacted as follows, to wit:

"'First. That the city of El Paso agree to and did rent from the El Paso Water Company, meaning the company first hereinbefore mentioned, and its successors and assigns, for and during the term of fifteen years from the first day of September, A. D., 1882, twenty-five hydrants (25) to be located by said company as directed by the city council of said city, and to be erected at the expense of said company or its successors or assigns.

"'Second. That said council agreed to pay an annual rental for each of said twenty-five hydrants of one hundred dollars, and for each hydrant constructed or erected as directed by said council in excess of said twenty-five hydrants and to and including fifty hydrants, the sum of sixty dollars per annum, and for each hydrant erected and located as directed by said city council in addition to and over and above said fifty hydrants, the sum of forty dollars per annum, the rental for all of said hydrants to be paid in quarterly installments.

"'Third. That said company or its successors or assigns, from and after the first day of January, A. D., 1884, should not charge any of the inhabitants of said city a sum exceeding four cents per barrel of forty gallons, until such times as said city should have a population of eight thousand, after which time and until such time as said city should have a population of twelve thousand a sum not exceeding three cents per barrel of forty gallons should be charged for water.

"'Fourth. That for sprinkling purposes water should be taken by said city or any persons engaged in sprinkling the streets, alleys or public grounds with carts or wagons at a cost not to exceed two cents per barrel of forty gallons, and by any of the inhabitants of said city for private sprinkling at a cost not to exceed three cents per barrel of forty gallons.

"'Fifth. That approved meters should be furnished, attached and placed wherever and whenever necessary on said works at the cost of said company, meaning your orator.

"'Sixth. That in the maintenance of said water works, meaning the system established by your orator, a pressure of at least one hundred and fifty feet should be provided and maintained.

"'Seventh. That said El Paso Water Company, meaning your orator, should give a written guarantee to the city of El Paso that only clear, healthy water should be delivered to any of the inhabitants of said city for private uses under a penalty of free service for such time as the water delivered should be muddy and impure, and that said Water Company, meaning your orator, should further file its written acceptance of said ordinance of April the 29th, 1882, as amended by said ordinance of December 24th, 1883, and that said guaranty and acceptance should be spread on the minutes of said council and filed in the office of the city clerk of said city, to be and remain there as an archive. * * * * * * (Rec. 16, 17.)

"'And your orator, further amending, shows that prior to the passage of said ordinance of December 24th, 1883, your orator, acting under the direction of said city council of said city, erected at its own expense twenty-five (25) fire-hydrants, which were located from time to time at points designated by said city council along the lines of mains of your orator's said system of water works, and thereafter, as instructed from time to time by said council, has located and erected sixteen (16) additional fire-hydrants at its own cost and expense; that under and by virtue of its contract with said

city, as evidenced by the several ordinances hereinbefore mentioned, the validity of which contract has been constantly recognized by said city and its authorities until recently, as hereinafter set forth, your orator is justly and legally entitled to receive from said city for and during the remainder of said period of fifteen years, which period began on September 1st, 1882, the sum of one hundred dollars ($100) per annum for each of said twenty-five (25) hydrants first above mentioned, and the sum of sixty dollars ($60) per annum for each of said additional sixteen (16) hydrants, making in the aggregate the sum of three thousand four hundred and sixty dollars ($3,460) which said city is bound and liable under said contract to pay to your orator for each and every year of the unexpired portion of said period; and, further, that said city under said contract is legally bound to rent from your orator for and during the unexpired portion of said period any additional hydrants over and above those already located as aforesaid which may hereafter be required in said city and to pay to your orator for each additional hydrant, which do not increase the total number of hydrants above the aggregate of fifty, the sum annually of sixty dollars ($60), and for each above said aggregate the annual rental sum of forty dollars ($40); and your orator here shows that by ordinance of April 29th, 1882, supplemental to that of May 7th, 1881, the said city agreed to and did rent from your orator during said period of fifteen years, commencing September 1, 1882, twenty-five hydrants (25) for fire purposes, to be located as directed by said council, and agreed to pay your orator for each of the same an annual rental of one hundred dollars ($100), and further agreed to pay your orator annually the further sum of eighty dollars for each hydrant so constructed and erected in excess of said twenty-five hydrants; and your orator further shows that by said ordinance of December 24th, 1883, and your orator's acceptance of the provisions thereof, the city obtained an abatement of the rental price of all hydrants in excess of twenty-five (25) from eighty dollars ($80) each to sixty dollars ($60) and forty dollars ($40) respectfully, as above shown.'"

From the quotations of matters and facts appearing in the record, which for the purposes of this suit is admitted to be true by the defendant's demurrer, it will be observed that the appellant has invested in the construction of water works in El Paso the sum of $150,000.00 in complying with its parts of the contract; that this amount and investment, as well as its rights, privileges and franchise as conferred by said contract, *will be rendered valueless* if the declared purpose of the appellee is carried out.

It also appears from the record, on pages 3 and 23, that the amount of the bonds threatened to be issued and which are sought to be enjoined, is $100,000.00. It also appears that under the contract the appellee is liable to the the appellant for hydrants contracted for, the sum of $3,460 per annum for an unexpired term of more than five years, from the commencement of this suit, or a sum equal to $17,300.00. In addition to all that appears in the record, lest a doubt should still exist in the Court's mind, the affidavits of Sylvester Watts and William H. Watts are offered to the Court, both of which with reference to the loss and damage which the appellant is likely to suffer if the appellee violates its contract, as threatened, would be at least thirty thousand dollars, which is permissible under the practice of this Court.

Ex Parte Bradstreet, 32 U. S. 634.

[COPY of affidavits on file of WILLIAM H. WATTS and SYLVESTER WATTS.]

No. 1385.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF TEXAS.

William H. Watts, of lawful age, being duly sworn by me, did solemnly swear:

1st, That he is now and has been ever since the month of October, 1882, Superintendent of the El Paso Water Company, doing business at El Paso, Texas, and for all that time has resided at El Paso, Texas.

2nd, That as such Superintendent he has had charge of said Water Company's works and the supplying by it with water the town of El Paso and the inhabitants with water.

3rd, That the profits derived by said Water Company from the said town of El Paso and its inhabitants for supplying it and them with water for one year ending the 22nd day April, 1890, was more than eight thousand dollars.

4th, That if the town of El Paso were to operate a water works and supply *itself and its inhabitants* with water from the said 22nd day of April, 1890, until the 7th day of May, 1896, it would be a loss and damage to the El Paso Water Company of more than forty thousand dollars.

5th, That for the year ending the 22nd day of April, 1890, the El Paso Water Company received from the town

of El Paso for supplying it with water more than four thousand dollars, and that said town of El Paso will likely require a greater quantity each year until the 7th day of May, 1896.

6th, That if the said town of El Paso were to supply *itself with* water from said 22nd day of April, to 7th day of May, 1896, the loss and damage to the said Water Company would exceed the sum of twenty thousand dollars.

WILLIAM H. WATTS.

Subscribed and sworn before me, at El Paso, Texas, this 21st day of November, A. D. 1890.

GEO. WYTHE BAYLOR,
Clerk United States Court.

[SEAL]

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF MISSOURI.

EL PASO WATER COMPANY, Appellant,
vs.
THE CITY OF EL PASO, Appellee. } No. 1385.

Sylvester Watts, of lawful age, being duly sworn by me, did solemnly swear that he is now a resident of Webster Groves, St. Louis County, Missouri; that he is a hydraulic engineer and contractor of water works and gas works, and has been in said business for more than twenty years last past; that he constructed the water works at El Paso, Texas, and put them in operation on or about the 1st day of September, 1882; that he has ever since said 1st day of September, 1882, visited and examined said

water works at El Paso several times each year and is fully acquainted with the costs and value of the original plant and the additions added thereto, extending and enlarging said works, and of the profits derived from their operation.

That said water works has now a capacity to supply said city of El Paso and its inhabitants for the next six years at least; that if said city of El Paso construct and operate a water works and supply the City of El Paso and its inhabitants with water, it will be a loss of profits to the El Paso Water Company, appellant, of at least six thousand dollars per annum for the next five years following to and from the 22nd day of April, 1890.

SYLVESTER WATTS.

Subscribed and sworn to before me this 19th day of November, A. D. 1890.

A. P. SELBY,

[SEAL.] Clerk of the U. S. Circuit Court, Eastern Division, Eastern Judicial District of Missouri,

By GEORGE F. HAID,
Deputy.

THE ERRORS ASSIGNED.

The error complained of is the refusal of the lower court to grant the relief sought by the appellant and prayed for in its petition, and in following the decision of the case of The City of Brenham *vs.* Brenham Water Co., as rendered by the Supreme Court of Texas, cited by the appellee without noting the difference between the facts as presented in the case at bar and the Brenham case.

BRIEF OF APPELLANT.

I.

The attitude of the appellee here and indeed that taken by the court below was that the Supreme Court of the State of Texas had declared a similar contract to that which the appellant claims its rights under, a monopoly, under Section 26, Article I. of Constitution of the State of Texas, 1876, which is as follows (Sayler's Texas Stat., Vol., IV., page 507):

"Sec. 26.—Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed; nor shall the law of primogeniture or entailments ever be in force in this State."

The court did not consider for a moment Section 3 of said Article I. of the said Constitution of the State of Texas, which is as follows (Sayler's Stat., Vol. IV., page 500): and the exception noted in the Texas case.

"Sec. 3.—All freemen when they form a social compact have equal rights and no man, or set of men, is entitled to exclusive separate public emoluments or privileges but in consideration of public service."

The appellee contending and the lower court holding that the contract with the Water Company, although public service was to be rendered by it to the city for fifteen years (from September 1st 1882), the period of the contract, because it was exclusive to the company, it was a nullity. Thus the matter was disposed of by the lower court without ever giving any consideration to Section 3 of the Constitution, which gives the right to make a contract such as was made

by the city and the Water Company, where the company, by said contract, was to perform a public service.

The appellant, by the acceptance of the several ordinances and resolutions passed by the city relative to the supply of water to the city and its inhabitants, the payment to it by the city for such supply as it was to pay for, and the acceptance of the supply by the city, made gratuitously as stated on pages 17 and 18 of the Record, to wit, to the city, of 400,000 gallons of water per annum for its use in watering Plaza of said city ever since January 1st, 1885, *free of charge* during the period of the hydrant contract (fifteen years). This was in addition to the furnishing of all public buildings with water *at cost*, as contracted to be done by the appellant under the original contract, constituted a contract for a public service.

The city of El Paso has always recognized the appellant to be the legal owner by mesne assignment of all the rights, privileges and franchises granted by it to the El Paso Water Company, as set out in plaintiff's petition, on pages 1 and 2 of the Record.

This was not a gratuitous grant or franchise. It was, in consideration of the public service agreed to be rendered, and continuously rendered since by the appellant, the assignee of the exclusive privilege. Such a contract was clearly permissible under Section 3 of Article 1 of the Constitution of Texas. It was the donation of an exclusive privilege such as is intended to be prohibited by Section 26 of Article I. of the Constitution of Texas, which latter section was the only part of the Constitution passed on by the Supreme Court of Texas, in the case of The City of Brenham *vs.* Brenham Water Co.

Indeed the court in its opinion says, "There are however certain classes of exclusive privileges which do not amount

to monopolies, and a consideration of these and the ground on which they stand is not now necessary." In this language of the Supreme Court of Texas in the case so much relied upon by the appellee reference evidently was had to the exclusive privileges permissible under Section 3 of Article I. of the Constitution of Texas, cited heretofore, when given in consideration of public service, and inasmuch as no gratuitous public services were to be rendered under the ordinance in the Brenham case it was not necessary to consider what exclusive privileges might be granted. The case at bar is very different. Free public service has been continuously rendered by the El Paso Water Company to the city and its inhabitants and accepted by it.

The case of The City of Brenham *vs.* Brenham Water Co. was decided on the 25th day of March, 1887. (See 4 S. W. Rept. page 143, long prior to making this contract sought to be protected.

This Court has expressly held that such an exclusive privilege upon condition of service by the grantee after performance by the grantee, is a contract, protected by the Constitution of the United States.

Louisville Gas Company *vs.* Citizens' Gas Company, U. S. Rep. 115, page 683.

New Orleans Gas Company *vs.* Louisiana Light Company, U. S. Rep. 115, page 650. Also p. 674.

II.

According to the statements of the bill, which are admitted to be true, there was, we respectfully submit, a contract, and the only excuse for the proposed breach of it is that the city is not bound by it, because it claims it is

ultra vires. The consideration then resolves itself into whether or not the ordinance passed by the City Council of El Paso, on the 7th day of May, 1881, to the El Paso Water Company, granting to it the sole and exclusive right, warrant and authority for the period of fifteen years, to manufacture, sell and furnish water to the inhabitants of the city of El Paso, to both public and private buildings, and for irrigation within the corporate limits of said city, and to lay pipes, mains and conductors under the streets, alleys, lanes and squares in said city, for the purpose of conducting water, was it accepted and a large expenditure made to furnish said city and inhabitants by the appellant was a contract?

Furthermore, was such a contract authorized by the *special charter* granted by the legislative act of May 17th, 1873, and the general laws in force when the contract was made? and if so, should it not be protected by a court of equity? If the grant was within the charter powers of the town authorities, the attempt of these authorities to establish another system of water works is an open repudiation and an effort towards the violation of a contract, which we submit is protected by the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contract.

This inhibition necessarily not only includes State legislatures, but every subordinate governmental agency, including city councils.

Upon examination of the special act of the Legislature of the State of Texas it will be observed that it grants to the city of El Paso, other and greater powers than is generally given municipal corporations created by general laws relative to the contracting for supplying cities with water. Companies existing under the general laws in force

at the time. See General Laws of Texas, 1870, Art. 5993. Its charter empowers the city of El Paso to do, within its limits, and in fact beyond these, all that is necessary to provide the city with water and do all that a water company could do organized as a private company under Art. 5993 of General Laws.

This power was not a governmental one, to be exercised as an agent of the State for State purposes, but merely for the benefit of said city of El Paso and its inhabitants, and solely and exclusively for them.

Referring to the city charter, it will be seen that the city of El Paso was incorporated under a special act of the State of Texas, approved May 17th, 1873. Special Laws of 1873, page 438. By Section 1 of this act the inhabitants within a described limit were constituted a body politic, and under the name of "El Paso," among other powers, had the right to sell and convey personal estate and make such order respecting the same as may be conducive to the interest of the city *and make all contracts* and *do all other acts in relation to the property and concerns of the city, necessary* to the exercise of its *corporate* or *administrative* powers.

By Section 3 of said act these powers were to be exercised by the mayor and city council.

These were to dispense and direct the application of these powers both governmental (pertaining to the municipality) and administrative (pertaining to the proprietary) and pecuniary interest of the city and its inhabitants.

By Section 25 of said act these were authorized, "To provide the city with water, to make, regulate and establish public wells, pumps, cisterns, fountains, hydrants, reservoirs in the street or elsewhere within the said city or beyond the limits thereof, for the extinguishment of fires

and the convenience of the citizens." This is not a governmental power. By Section 22 of said act the power of the city to borrow money was limited over and above the general tax not to exceed one-half of one per cent. and the rate of interest not to exceed ten per cent., and by other limitations, so that it could not carry out the privileges granted to it to supply the city and its inhabitants with water. Under the General Laws of Texas, then in force, a private corporation could have been formed for "the supply of water to the public." Subdivision 14 of Art. 5935 Laws of Texas, but under Art. 5992 of said laws. But when a corporation was incorporated merely for this purpose it was necessary to get the consent of the municipal authorities of the city where such company proposed to operate before it could lay pipes, etc.

Under Art. 5993 the municipal authorities of any city were authorized to contract for supplying with water the streets, lots, lanes, squares and public places in such city.

By this special act of the Legislature and the General Law there was virtually granted to the city of El Paso exclusive control of matters relative to the supply of water for the city and its inhabitants, but it ascertained that the limitation to taxation prevented it from carrying out the privilege granted, and it sold, conveyed and assigned this privilege to the Water Company by mesne conveyances and contracts and its good-will in this business for fifteen years, and good faith requires that the city should do nothing which directly tends to deprive the company of its benefits and advantage for this period.

Hall's Appeal, 60 Penn. St. 458.

Saugatuck Bridge Co. *vs.* Town of Westport, 39 Conn. 337.

This is especially so when the enterprise required a large capital and individual engery to meet the rapid growth of the city where the chances of gain were no more than equal to the risk of loss. This being the status of affairs, it is no more than just and reasonable to suppose that the Water Company would not have invested its capital without knowing whether the city intended to assume the power given it at any time or not.

The exclusive privilege is nothing but the guaranty given by the city to the Water Company that it should not engage in this business for fifteen years, and inasmuch as it contracted for that length of time, *its power is executed* and it can legally do nothing and ought not be permitted to do anything so long as the Water Company complies with its contract. This doctrine is equitably elucidated in the following case, which is a parallel case to the one at bar:

Atlantic City Water Works *vs.* Atlantic City, 12 Stewart's New Jersey Equity Reports, 39, page 367,

and cases cited in the decision.

A clear distinction is made between the powers that are governmental, and the privileges granted to a muncipal body, which might be conferred on a private corporation.

An eminent court says:

"It is the duty of the State Government to secure to the citizens of the State the peaceful enjoyment of their property and its protection from wrongful and violent acts."

For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations, to be exercised for the benefit of the individuals of whom such corporation are

composed; and in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there are distinctions between those powers delegated to municipal corporations, to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers; and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation and its adaptation to the purposes of residence or business.

As to the first the municipal corporation represents the State, discharges duties incumbent on the State; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable.

Western College, etc. *vs.* City of Cleveland, 12 Ohio, 375.

"A municipal corporation is created mainly for the interest, advantage and convenience of the locality and its people."

"In the case of municipal corporations proper, the electors are mediately invested with very ample control over their agents, not only as to what shall be done, but how it shall be done, and by whom it shall be done; they may exact such guarantee as they deem proper for their government."

"Where an act is done to the injury of another by a natural person in pursuit of his own interest, or through its agents by an artificial person or corporation proper which is called into existence, either at a direct solicitation or by the free consent of the persons composing it, for the promotion of their own local and private advantage and convenience, and which can work only through agents, such natural or artificial persons is on every principle of justice and enlightened reason bound to rectify the consequence of his own misfeasance."

Commrs. of Hamilton Co. *vs.* Mighels, 7 Ohio St. 109.

"The Master of Rolls, in speaking of the *East India Company*, admitted that it had *rights* as a *sovereign power*, but declared that it had also *duties* as an *individual*, and notwithstanding its claim to the right of violating its contract as an incident to its character as a sovereign power, it was held to be bound to its contracts as a private company."

Moodlay *vs.* Morton, 1. Brown's Ch. Rep. 471.

The restriction upon the power of a municipal corporation to enter into contracts which may prevent it from performing its duty to the public, is nothing more than the application of the principle which avoids the contracts of individuals when they are detrimental to the public rights. But the contract which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses relate to "the things of commerce," as distinguished in the civil law from the "things public," which are regulated by the sovereign. Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation.

The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for private emolument and advantage of the city as for the public good. The whole investment is the private property of the city as much as the lands and houses belonging to it: "* * * * It stands upon the same footing as would any individual or body of persons upon whom the

like special franchise had been conferred." (Citing Bailey *vs.* The City of New York, 3 Hill, 538.)

In this case it also cites Green *vs.* Biddle, 8 Wheat. 84: "The objection to a law on the ground of its impairing the obligations of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms * * * however minute or apparently immaterial in their effects upon the contract of the parties, impairs its obligations."

Western Saving Fund Society *vs.* The City of Philadelphia, 31 Penn. St. Rep. 175.

With regard to the illegality of the bonds it is apparent from the facts stated in the bill and admitted by the demurrer thereto that bonds of the face value of $100,000 are about to be issued by the appellee, for the payment of which and the interest thereon this appellant will be illegally taxed by it.

The appellant has a common undivided interest (with all other tax-payers it is true, but these are so numerous that it would be impracticable to name them all in the bill and have them join) in preventing the issuance of these bonds for the payment of which the appellant and these are to be illegally taxed, the several amounts of which at present are unascertainable. The appellant respectfully submits that under these circumstances the matter in dispute is the amount of the bonds.

Davies *vs.* Corbin, 112, U. S. 36.
Shields *vs.* Thomas, 58, U. S. 3.
Market Company *vs.* Hoffman, 101, U. S. 112.

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